88-1209

Supreme Court, U.S.
FILED
JAN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT as Trustee of the Bankruptcy Estate of Charles W. and Nellie P. Bauer, SOVRAN BANK CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. MEYER
DAVID N. BURN
BURN & MEYER
150 Second Avenue North
Suite 315
Nashville, TN. 37201
(615) 256-5568
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

10 pp

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1411, which provides that nothing in title 11 shall affect an individual's right to a jury trial for personal injury claims, preserve a Chapter 7 debtor's right to continue to be a party to a lawsuit for his personal injuries and to have the action tried by a jury in an Article III forum?

2. If 28 U.S.C. § 1411 preserves a Chapter 7 debtor's right to a jury trial in an action for his personal injuries, is a District Court order which substitutes the Bankruptcy Trustee as the sole party plaintiff, thereby effectively dismissing the debtor from the lawsuit and depriving him of his right to a jury trial, immediately appealable under the Collateral Order Doctrine?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Index to Appendix	viii
Opinions Below	2
Grounds On Which Jurisdiction Is Invoked	2
Constitutional And Statutory Provisions Involved	3
Statement Of The Case	8
Reasons For Granting The Writ	11
Argument	14
Conclusion	26

TABLE OF AUTHORITIES

Page

A. H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986) 11,12,17,19

Aaron v. SEC, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) 15

Bauer, et al. v. Waldschmidt, et.al., No. 87-5617 2

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948) 12,13,14

Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 351 (1978) 25

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed.2d 628 (1982) . 15

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed.2d 571 (1981) 12,25

Flanagan v. United States, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed.2d 349 (1982) 25

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed.2d 66 (1979) 16

Granfinanciera, S.A. v. Nordberg, No. 87-1716 13

Jarecki v. Searle & Co., 367 U.S. 303, 81 S. Ct. 1579, 6 L. Ed.2d 859 (1961) 16

Judice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, L. Ed.2d 376 (1977) 16

Kadel v. Thompson, 84 B.R. 878 (N.D. Ga. 1988) 11,17

Kokosza v. Belford, 417 U.S. 642, 94 S. Ct. 2431, 41 L. Ed.2d 374 (1974) 14

Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976) 18

Nixon v. Fitzgerald, 457 U.S. 739, 102 S. Ct. 2690, 73 L. Ed.2d 349 (1982) 13,25

Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 72 L. Ed.2d 598 (1982) 21,22,24

Protective Committee for Independent Shareholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 99 S. Ct. 1157, 20 L. Ed.2d 1 (1968) 17

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed.2d 450 (1977) 16

Sedima S.P.R.L. v. Imrex Co., ____ U.S. ____, 105 S.Ct. 3257 (1985) 15

Walters v. National Association of Radiation Survivors, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed.2d 220 (1985) 18

In re Anderson, 345 F. Supp. 840 (E.D. Tenn. 1972) ... 20

In re Johns-Manville Corp., 45 B.R. 823 (S.D.N.Y. 1984) 11,12,17,19

In re McCorhill Publishing, Inc., 89 B.R. 393 (Bkrcy, S.D.N.Y.) 11,12,17

In re UNR Industries, 45 B.R. 322 (N.D. Ill. 1984) 11,12, 18,19

Constitution, Statutes, Rules and Regulations:

Article I § 8 of the Constitution 21

11 U.S.C. § 70(a) (Repealed) 7,12,20

11 U.S.C. §§ 101, et.seq 8,14

11 U.S.C. § 323 5,15,16

11 U.S.C. § 541 5,15,24

11 U.S.C. § 726(a) 6

28 U.S.C. § 157(b)(2)(B) 3

28 U.S.C. § 157(b)(2)(O) 3

28 U.S.C. § 157(b)(5).....3,11,12,17,18

28 U.S.C. § 1254 2

28 U.S.C. § 1291 5,14

28 U.S.C. § 1332 2

28 U.S.C. § 1334.....3,12,21

28 U.S.C. § 1411 .....4,12,14,15, 16,18,19,21

28 U.S.C. § 1480(a) 7,19,20,21,24

28 U.S.C. § 2071 12,18

28 U.S.C. § 2075 12,18

F.R.C.P. Rule 17(b) 15

Bankruptcy Rule 6009 16

Bankruptcy Rule 9019 11,18

Other Authorities:

Creditor's Rights - Garnishment of Claims for Personal Injury - Property Vesting in the Bankruptcy Trustee, 40 Tenn. L. Rev. 508 (1973) 23

W. Keeton, *Prosser and Keaton on the Law of Torts*, § 3 (5th ed. 1984) 22

Levy, *Trial by Jury Under the Bankruptcy Reform Act of 1978*, 12 U. of Conn. L. Rev. 1 (1979) 20

Cong.Rec. S 8895 96 (daily ed. June 29, 1984) 21

Cong.Rec. S 7618-9 (daily ed. June 19, 1984) 21

Cong.Rec. S 6088-89 (daily ed. May 21, 1984) 21

INDEX TO APPENDIX

	Page
Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit Dated October 20, 1988	A-1
Order of the United States District Court for the Middle District of Tennessee Substituting the Trustee as the Sole Party Plaintiff	A-7
Order of the District Court Lifting Stay of the Lawsuit and Directing the Trustee to Abandon, Join as a Party or Authorize the Plaintiffs to Proceed	A-8
Order of the United States District Court for the Middle District of Tennessee Staying the Lawsuit	A-10
Complaint	A-13
Scheduling Order	A-19
District Court Docket Sheet	A-22
Petition to Reopen Bankruptcy Case	A-32
Notice of Proposed Compromise and Settlement	A-35
Motion to Lift Stay of the Lawsuit and Withdraw Order of Reference to Bankruptcy Court	A-37
Correspondence Between Petitioners' Counsel and Trustee	A-39
Order Denying Defendants' Motion to Dismiss Lawsuit	A-42
Renewed Objection to Proposed Compromise and Settlement	A-48
Motions to Clarify Order Lifting Stay of Lawsuit	A-54
Denial of Motions to Clarify	A-63

Trustee's Motion to Intervene in Lawsuit A-64

Transcript of Proceedings dated 3/6/87. Argument of Craig J. Donaldson A-66

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT as Trustee of the Bankruptcy Estate of Charles W. and Nellie P. Bauer, SOVRAN BANK CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Charles W. and Nellie P. Bauer, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, rendered in this proceeding on October 20, 1988, wherein the Court of Appeals dismissed Petitioners' appeal for want of appellate jurisdiction and thus let stand the District Court's substitution of the Trustee of the Petitioners' bankruptcy estate as sole party plaintiff in an action for Petitioners' personal injuries.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on October 20, 1988 and is styled *Bauer, et.al. v. Waldschmidt, et.al.*, No. 87-5617, and is attached hereto as Appendix A.

Petitioners instituted this lawsuit to recover damages for personal injuries which they suffered as a result of an intentional tort committed by the defendants. They brought suit in the United States District Court for the Middle District of Tennessee based on diversity of citizenship. The District Court had jurisdiction under 28 U.S.C. § 1332. On June 26, 1986, the District Court entered an order staying further proceedings in the lawsuit to enable the Petitioners to reopen their bankruptcy case. The transcript of that bench ruling is attached hereto as Appendix B. On April 1, 1987, the District Court lifted the stay and ordered the Trustee either to join as a party, abandon all interest in the lawsuit or authorize Petitioners to proceed on behalf of the estate. That order is attached hereto as Appendix C. On May 22, 1987, the District Court entered an order substituting the Trustee as the sole party plaintiff. That order is attached hereto as Appendix D.

The decision of the Sixth Circuit has been recommended for full-text publication.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was rendered on October 20, 1988. The petitioners did not file a petition to rehear. This petition is timely filed within ninety (90) days of the date of the decision. Jurisdiction in invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 157(b)(2)(B), (b)(2)(0), (b)(4) and (b)(5)
Procedures —
(b)(2)(B)

(2) Core proceedings include, but are not limited to—

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

. . .

(0) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(b)(4) Non-core proceedings under § 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of § 1334(c)(2).

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1334
Bankruptcy cases and proceedings —

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under the title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate.

28 U.S.C. § 1411
Jury trials —

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that

an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

28 U.S.C. § 1291
Final decisions of district courts —

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§ 1292(c) and (d) and 1295 of this title.

11 U.S.C. § 323
Role and capacity of trustee —

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

11 U.S.C. § 541
Property of the estate —

(a)(1) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 726(a)
Distribution of property of the estate —

(a) Except as provided in section 510 of this title, property of the estate shall be distributed —

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1),(3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title;

or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

11 U.S.C. § 70(a) (Repealed)
Title to Property —

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process. . .

28 U.S.C. § 1480(a)(Repealed)
Jury Trials —

Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or arising in or related to a case under title 11 that is provided by any statute in effect on September 30, 1979.

STATEMENT OF THE CASE

The two questions before this Court are primarily questions of law. However, the following facts and points of procedural history are submitted to place the issues in context. In addition, to the previously identified orders, these points are set forth in the complaint (Appendix E), scheduling order (Appendix F), district court docket sheet (Appendix G), petition to reopen petitioner's bankruptcy case (Appendix H), the trustee's notice of proposed compromise and settlement (Appendix I), petitioner's motion to lift stay and withdraw the order of reference (Appendix J), and other documents specifcally identified in the text, below.

Petitioners filed this lawsuit in the United States District Court for the Middle District of Tennessee in October 1985 based on the tort of outrageous conduct, a personal injury tort arising under the common law of Tennessee. See: *Medlin v. Allied Investment Corp.*, 217 Tenn. 469, 398 S.W.2d 270 (1966). The essence of the complaint was that Commerce Union Bank of Clarksville, Tennessee and the other defendants (hereinafter collectively referred to as the "Bank") had used the acceleration of a note and foreclosure of the second mortgage on Petitioners' home as an instrument of revenge. As a proximate result of the Bank's conduct, Petitioners suffered severe emotional distress and other personal injuries. They filed their complaint in the District Court based upon diversity of citizenship, since they had moved to Alabama after losing their home in Tennessee.

In February, 1985, the Petitioners had filed a petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq. The bankruptcy was one of the proximate results of the tortious conduct which formed the basis for the District Court lawsuit. Respondent Robert H. Waldschmidt was the Trustee of the Chapter 7 estate. Although the cause of action arose before the filing of the bankruptcy proceedings, Peti-

tioners did not list it on their bankruptcy schedules and statements. They did not do so because Petitioners did not know that they had legal recourse against the Bank. (The attorney who represented the Petitioners in their original Chapter 7 proceedings was never a counsel of record in the District Court lawsuit, and was replaced as counsel in the bankruptcy case at the time that case was reopened.)

Petitioners' present counsel learned that the cause of action had arisen before the bankruptcy case and notified the former Trustee about the lawsuit within a short time after it was filed. In a telephone conversation, confirmed by subsequent correspondence, the former Trustee authorized the Petitioners to proceed on behalf of the estate and to account to him for any judgment proceeds. The Trustee's only caveat concerned the payment of attorney's fees. Copies of the correspondence are set forth in Appendix K.

The Bank responded to the complaint with a motion to dismiss. It contended that Petitioners had failed to state a claim and further argued that Petitioners could not bring the action because title to the property was in the bankruptcy estate. The District Court denied the motion, holding that the allegations, if proven, stated a cause of action under the tort of outrageous conduct. The Court also determined that Petitioners could properly proceed based upon their arrangement with the Trustee. A copy of the District Court's Opinion is set forth in Appendix L.

The Bank filed a motion for summary judgment on the eve of trial, again contending that Petitoners lacked standing to bring the lawsuit because the cause of action belonged to the bankruptcy estate. The District Court stayed further proceedings in the lawsuit to allow Petitioners to reopen their bankruptcy case. The Court also instructed the Bankruptcy Court to take one of three actions: (1) abandon the cause of action; (2) order the Trustee to join as a party; or (3) authorize the Petitioners to proceed on behalf of the bankruptcy estate.

The Bankruptcy Court reopened the case and reappointed the former Trustee. Within a short time thereafter, the Trustee filed in the Bankruptcy Court a notice of proposed compromise and settlement. Under the proposal, the Trustee agreed to settle the lawsuit for the payment of $7,500 and the Bank's release of any claim's which it might have had in the bankruptcy case. Petitioners responded by converting the case to Chapter 13 and by objecting to the approval of the settlement (Appendix M). After the Bankruptcy Court denied confirmation of their Chapter 13 plan, Petitioners filed a motion in District Court seeking a lifting of the District Court's stay of the lawsuit and requesting that the District Court "withdraw the reference" from the Bankruptcy Court of all matters relating to disposition of the lawsuit. The District Court lifted the stay and ordered the Trustee to abandon the claim, join as a party or authorize the Petitioners to proceed. The Petitioners and Bank sought clarification of the order. The Bank did so asking the District Court to include substitution as another option for the Trustee (Appendix N). The District Court denied both motions (Appendix O).

After entry of the order denying clarification, the Trustee moved to intervene, but in the body of of that motion, prayed that he be substituted as sole party plaintiff and further asked that his substitution be treated as an election to join. (Appendix P). The District Court entered an order granting the motion and substituting the Trustee as sole party plaintiff. The Order which the District Court entered had been prepared and tendered by the Trustee simultaneously with the filing of his motion to intervene.

A timely appeal was taken to the United States Court of Appeals for the Sixth Circuit. That court dismissed the appeal, thus affirming the District Court's substitution order, on October 20, 1988.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has effectively affirmed the district court's order substituting the Trustee as the sole party plaintiff by granting the Bank's motion to dismiss the appeal for lack of finality. Petitioners are aggrieved by the decision and submit that the decision is based on a misinterpretation of or disregard for federal statutory law, its legislative history; misapplication of well established rules of statutory construction; fundamental principles of due process; principles of federalism and the public policies Congress intended to further through its enactment of the statutes at issue.

Although the Sixth Circuit recognized the Petitioners' interest in the outcome of the lawsuit, it still concluded that they had no standing to be parties. This position is in conflict with the view of a court in the Second Circuit. In the case of *In re McCorhill Publishing, Inc.*, 89 B.R. 393 (Bkrcy., S.D.N.Y. 1988) the court held that debtors have standing to be parties to actions involving their bankruptcy estate even though the cause of action, technically, belongs to the estate and the Trustee is the estate's representative.

The only remedy available to injured debtors in bankruptcy cases as a result of the Sixth Circuit's decision is to contest a proposed settlement in Bankruptcy Court under Bankruptcy Rule 9019. However, this is a "summary" proceeding in a forum which lacks the authority to dispose of the lawsuit. 28 U.S.C. § 157(b)(5); *A.H. Robbins Co. v. Piccinin*, 788 F.2d (4th Cir. 1986); *Kadel v. Thompson*, 84 B.R. 878 (N.D. Ga. 1988); *In re Johns-Manville Corp.*, 45 B.R. 823 (S.D.N.Y. 1984); *In re UNR Industries*, 45 B.R. 322 (N.D. Ill. 1984). A hearing in such a forum offends fundamental principles of due process because it is the equivalent of no hearing.

Another practical effect of the Sixth Circuit's holding is to enable bankruptcy courts in the Sixth Circuit to use proceedings under Bankruptcy Rule 9019 as the means to assert subject mat-

ter jurisdiction over the liquidation of personal injury claims. The result is to allow a Bankruptcy Rule to override the congressional intent expressed in 28 U.S.C. § 157(b)(5), that personal injury actions can only be disposed of in district courts or an appropriate state court, and is contrary to congressional commands concerning conflicts between rules and statutes. 28 U.S.C. § 2071 states that all rules shall be consistent with Acts of Congress. More particularly, 28 U.S.C. § 2075 states that the Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right."

The Sixth Circuit's position also appears to be in conflict with the Fourth Circuit's position with respect to a bankruptcy court's authority to dispose of personal injury claims. In *A.H. Robbins Co. v. Piccinin, supra*. The Sixth circuit's holding likewise appears to be in conflict with the position taken by courts in the Second and Seventh Circuits. *In re McCorhill Publishing, Inc., supra*; *In re Johns Manville Corp., supra*; *In re UNR Industries, supra.*

Another effect of the Sixth Circuit's decision is to allow bankruptcy courts to impede or interfere with the state policies and interests which lie beneath the traditional treatment of personal injury actions within the context of the debtor-creditor relationship. As is evident from the texts of 28 U.S.C. §§ 157, 1334 and 1411, and their legislative history, such interference is contrary to congressional intent to preserve the historic state law treatment of unliquidated personal injury actions. Thus deference to state law principles is similar to, and flows from, the principles embraced by former section 70(a)(5) of the Bankruptcy Act.

Petitioners respectfully submit that the foregoing reasons demonstrate that the underlying question in this case is sufficiently important to justify review under the Collateral Order Doctrine as set forth in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed.2d 571 (1981) and *Cohen*

v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948). At issue are the rights to be a party to a lawsuit and to have the case tried by a jury, rights which lose their practical value unless exercised at trial. *Nixon v. Fitzgerald*, 457 U.S. 739, 102 S. Ct. 2690, 73 L. Ed.2d 349 (1982).

The fact that this Honorable Court has recently granted a writ of certiorari in a case involving similar issues provides further proof of the importance of the issues. *Granfinanciera, S.A. v. Nordberg*, No. 87-1716 also involves the issue of the right to jury trial, to be a party to a lawsuit and to have the case tried. Although there are differences between the cases, in that the Petitioners in this case claim a statutory right to a trial by jury of a common law cause of action in an Article III court, the underlying policies and issues which must be addressed in both cases are similar and, of equal importance. In view of the similarities, Petitioners submit that the interests of judicial economy might be well served by consolidating the cases for purposes of argument.

ARGUMENT

The Sixth Circuit dismissed Petitioners' appeal for lack of appellate jurisdiction. It held that the District Court's substitution order was not a final order within the meaning of 28 U.S.C. §1291 and did not come within the Collateral Order Doctrine first enunciated in *Cohen v. Beneficial Industrial Loan Corp., supra.* Although the Court determined that the substitution order finally decided the disputed issue and was unrelated to the merits of the lawsuit, appellate jurisdiction was found to be lacking because the Court decided that the issue was not sufficiently important to justify review at this time. Having decided the matter as it did, the Court did not address the question of whether the issue would effectively evade review.

Although the Sixth Circuit's decision was technically limited to the issue of appellate jurisdiction, resolution of the question required a review of the underlying merits. As the opinion shows, the merits of the underlying question are intertwined with the jurisdictional issue. Since the underlying merits have a direct bearing on the jurisdictional question, they will be addressed first for organizational purposes. This will be followed by a discussion of the jurisdictional issue.

The premise of the Sixth Circuit's decision was that the Bankruptcy Code, 11 U.S.C. §§ 101, et seq. governed the outcome of this case. Therefore, it reasoned, 28 U.S.C. § 1411 did nothing more than preserve the Trustee's right to demand a jury trial for personal injury claims belonging to the estate.

Petitioners respectfully submit that the Sixth Circuit disregarded the purpose of statutory construction, and the most basic rules of interpretation, to reach this result. As this Honorable Court has stated, the purpose of statutory interpretation is to effectuate the intent of Congress. Legislative intent is to be ascertained in the first instance from the plain meaning of the statutory text and, if necessary, the available legislative history. *Kokosza v. Belford*, 417 U.S. 642, 94 S. Ct.

2431, 41 L. Ed.2d 374 (1974). Accordingly, the first rule of interpretation is that the starting point is the text of the statute at issue. This Honorable Court has instructed lower courts to follow this rule on a number of occasions. *See, e.g.: Sedima S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S. Ct. 3257 (1985); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed.2d 628 (1982); *Aaron v. SEC*, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed.2d 611 (1980).

The text of 28 U.S.C. § 1411 exposes the first flaw in the Sixth Circuit's reasoning. The introductory language of the statute shows that the Bankruptcy Code should not have been the starting point of its analysis. Petitioners respectfully submit that the words "nothing in Title 11 shall affect" indicates that Congress intended to create an exception to the normal operation of the Bankruptcy Code. The common sense meaning of this language makes it plain that neither 11 U.S.C. §§ 323 nor 541 affects the rights described in 28 U.S.C. § 1411. In the absence of Title 11, the right to a jury trial would certainly belong to the injured party. The purpose of section 1411 is to preserve the injured party's right.

The text of 28 U.S.C. § 1411 offers further evidence that Congress intended to preserve Petitioners' right to a jury trial on their personal injury claim. The use of the term "individual" supports this. In the litigation context, the term is used to describe the capacity in which a party participates in a civil action. For example, F.R.C.P. Rule 17(b) uses the term to contrast with a representative capacity. If Congress had intended to merely preserve the Trustee's rights, it would have omitted the term. The Trustee does not participate in litigation involving a bankruptcy estate in an individual capacity. By definition, he acts in a representative capacity. See 11 U.S.C. § 323.

Another rule of statutory construction supports Petitioners' position. The language of parts of a statutory scheme should not be construed in a manner which renders the language of

other parts redundant or superflous. *Jarecki v. Searle & Co.*, 367 U.S. 303, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961). The Sixth Circuit's construction turned 28 U.S.C. § 1411 into a meaningless component. The Trustee does not need 28 U.S.C. § 1411 to obtain a jury trial. The Bankruptcy Code and Rules provide sufficient authorization. 11 U.S.C. § 323 states that the Trustee has the capacity to sue and be sued. Bankruptcy Rule 6009 authorizes the Trustee to prosecute and/or defend actions on behalf of the estate in the appropriate forum. Implicit in these powers is the right to demand a jury trial in appropriate actions, just as any other litigant could do. Petitioners' interpretation of section 1411 is consistent with the foregoing rule of construction. Their interpretation gives meaning to the statute because that construction preserves the individual debtor's right to a jury trial, separate and distinct from the rights which could be exercised by the Trustee.

The Sixth Circuit's failure to follow the foregoing rules of construction has resulted in a decision which is based on a material internal inconsistency. One of the underlying premises of the decision is that Petitioners have a stake in the outcome and therefore a right to be heard. The Court, however, determined that the right to be heard is restricted to a hearing in the bankruptcy court in the first instance. (Appendix A at 4-5).

To say that one has a stake in the outcome but lacks standing is contrary to the generally recognized definition of the term. In essence, standing means nothing more than stake in the outcome. A person bringing an action must claim that he has suffered some injury at the hands of the defendants, or show or claim some other definite interest in the outcome of the action. See, e.g.: *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979); *Judice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211, L. Ed. 2d 376 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

The Sixth Circuit's finding that the Petitioners have a stake in the outcome but no standing to be parties to the lawsuit, is at odds with this Honorable Court's decision in *Protective Committee of Shareholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 99 S. Ct. 1157, 20 L. Ed. 2d 1 (1968). Implicit in that case was the recognition that a debtor's interest in augmenting the estate for the benefit of his creditors, and/or to generate surplus, gives him a sufficient stake in the outcome to be heard.

A court in the Second Circuit has recently reached the same conclusion, that debtors have standing to be parties in actions affecting their bankruptcy estates, in the case of *In re McCorhill Publishing, Inc., supra.* In that case, the court held that a debtor's interest in protecting any potential surplus constituted a sufficient stake in the outcome to confer standing. It reasoned that since a trustee's main duty is to further the interest of the creditors, he does not have much incentive to try to protect or produce surplus. As a result, the debtor is the only one who can effectively protect that interest because it directly affects him. The Sixth Circuit's decision is in conflict with *In re McCorhill Publishing, Inc., supra.*

The result of the Sixth Circuit's contradictory reasoning is that the Petitioners have been left without a forum in which they can effectively protect their interests. Having concluded that the Petitioners have some stake in the outcome, the Court recognized that they had a right to be heard somewhere. However, the appropriate forum, according to the Court, is the bankruptcy court in the first instance, and then in the district court under its appellate jurisdiction. Bankruptcy courts, however, do not have the authority to dispose of personal injury claims. 28 U.S.C. § 157(b)(5) states that these claims must be tried in the district court. This has been interpreted as removing the bankruptcy court's authority to render final and binding rulings concerning the rights and liabilities of the parties in personal injury actions. *A.H. Robbins Co. v. Piccinin, supra; Kadel v. Thompson, supra; In re Johns-Manville Corp., supra;*

In re UNR Industries, supra. The most fundamental notions of due process require providing affected persons a meaningful hearing before rendering a final determination of their rights and/or liabilities. *See, e.g.: Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). A hearing in a forum which lacks the authority to dispose of the claim is the equivalent of no hearing and would therefore violate the most basic notions of due process. Congress could not have intended such a result. Petitioners respectfully submit the foregoing provides further evidence that Congress enacted 28 U.S.C. § 1411 to preserve the right of Petitioners and other similarily situated persons to remain as parties in actions to recover damages for their personal injuries and to have those claims tried before a jury.

The Sixth Circuit's opinion has another effect which places its position at further odds with the position taken by the Fourth Circuit and courts in other circuits. As the record shows, the Trustee and other Respondents have proposed to settle the lawsuit and have sought bankruptcy court approval. Bankruptcy Rule 9019 ostensibly provides the mechanism for obtaining such permission. As the Bank has acknowledged, if the bankruptcy court approves the settlement, the only remaining step is to "bother" the district court with an agreed order (Appendix Q). Under this scenario disposition in district court would be in form only. In substance, however, it is the bankruptcy court which makes the decision the extent of the tortfeasor's liability and thus effectively disposes of the case. Congress forbade bankruptcy courts to use direct means to accomplish this end when it enacted 28 U.S.C. §§ (6)(2)(0) and (6)(5). Having taken such action, it could not have intended to allow the same result to be accomplished by indirect means.

To the extent that Bankruptcy Rule 9019 might authorize such a result, it would be in conflict with 28 U.S.C. § 157(b)(5). Under 28 U.S.C. §§ 2071 and 2075, that conflict would have to

be resolved in favor of the statute. The Sixth Circuit failed to come to terms with this command in its interpretation of the statute.

In *A.H. Robbins Co. v. Piccinin, supra,* the Fourth Circuit held that, although bankruptcy courts have the authority to estimate personal injury claims for some purposes, such as to make a determination concerning the feasibility of a plan of reorganization, they have no authority to liquidate such claims. Courts in the Second and Seventh Circuits have taken similar positions. *In re Johns-Manville Corp., supra*; *In re UNR Industries, supra.* Since these courts have taken the position that bankruptcy courts cannot use direct means to dispose of personal injury claims, Petitioners submit that they would, in all likelihood, prohibit bankruptcy courts from accomplishing the same result by indirect means.

The Sixth Circuit used portions of the legislative history of the 1984 Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") to support its opinion. It noted that some of the comments indicated that in enacting 28 U.S.C. § 1411, Congress did not intend to modify rights to jury trials which might have existed under the Bankruptcy Reform Act. Petitioners respectfully submit that these portions of the legislative history relied upon by the Sixth Circuit do not support its decision. In fact, closer analysis of these and other pieces of the legislative history actually support Petitioners' position.

The statute to which the Sixth Circuit referred was former 28 U.S.C. § 1480(a). It stated

> Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to a trial by jury, in a case under title 11 or in a proceeding under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979. *Id.*

The purpose of that provision, according to the House Committee Report, was to preserve the right to trial by jury as it existed prior to the passage of the Reform Act. Levy, *Trial by Jury Under the Bankruptcy Reform Act of 1978*, 12 U. of Conn. L. Rev. 1, 7-9 (1979). Under the Reform Act these trials would be conducted in bankruptcy court, *Id.* at 2. Determination of whether a person had the right to a jury trial required the court to determine whether a person would have had the right to a jury trial prior to the effective date of the Code. If so, 28 U.S.C. § 1480 preserved that right. Application of this analysis demonstrates that Petitioners would have had the right to a jury trial under 28 U.S.C. § 1480. Prior to the effective date of the Code, the injured debtors unquestionably had the right to a trial by jury in actions for their personal injuries. Petitioners would have retained title to their personal injury claim under prior law. Former 11 U.S.C. § 70(a)(5) expressly excluded personal injury claims from the property of the estate if creditors could not reach such claims under state law. Tennessee law did not allow creditors to reach these claims. *In re Anderson*, 345 F. Supp. 840 (E.D. Tenn. 1972). Since Petitioners would have owned the claim, they would have had the right to a trial by jury. Petitioners submit that 28 U.S.C. § 1480 preserved that right. Thus, even if the Sixth Circuit was correct in its assumption that section 1411 did not expand the reach of section 1480, it nonetheless erred in its conclusion that Petitioners have no right to a jury trial, because they would indeed have had such a right under section 1480.

There is, however, one piece of legislative history which shows that 28 U.S.C. § 1411 was intended to modify and clarify former 28 U.S.C. § 1480. In comments during a session before the Senate Judiciary Committee, Senator Heflin indicated that one of the reasons for the differences in language between Section 1480 and 1411 was to correct a potential problem. The former had limited the right to a jury trial to statutory rights. The latter, on the other hand, was intended to make it clear that the right to a jury trial was to be preserved if such a right also

existed under the common law or constitutional provision. Senator Heflin also stated that another purpose of the language change was to make it clear that if a debtor or other party had a right to a jury trial in the absence of bankruptcy, that right was to be preserved. Cong. Rec. S 7618-9 (daily ed. June 19, 1984). Thus, even if former 28 U.S.C. § 1480 would not have preserved the petitioners' right to trial by jury, Senator Heflin's comments indicate that 28 U.S.C. § 1411 does so.

Other portions of the legislative history, when considered in light of historic state policies governing the treatment of personal injury actions within the context of the debtor-creditor relationship, provide further support for Petitioners' contention that they have the right to remain as parties in the District Court and to have the lawsuit tried before a jury. The legislative history shows that Congress enacted 28 U.S.C. §§ 157, 1334 and 1411 in response to this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S. Ct. 2858, 72 L. Ed. 2d. 598 (1982). *See, e.g.: Analysis of Proposed Amendments to the Bankruptcy Act of 1978*, Cong.Rec., S. 8895 96 (daily ed. June 29, 1984). As that report shows, 28 U.S.C. § 157 was enacted to address this Court's separation of powers objections.

Another area of congessional concern was the issue of federalism. As Senator Hatch's comments show, Congress perceived at least a potential problem with using the powers granted to Congress under Article I § 8 of the Constitution to encroach on state created interests. In sum, there was a recognition that those powers had limits at some point. 28 U.S.C. § 1334 was the main expression of this concern. Cong.Rec. S 6088-89 (daily ed. May 21, 1984). 28 U.S.C. § 157 also demonstrates a concern for federalism and due process.

As Senator Hatch's comments, *supra*, show, one of the reasons for abstention was efficiency. Bringing a host of tort claims to the bankruptcy court could clog its dockets. This

would result in having less time to devote to traditional bankruptcy concerns. In most situations, state claims are better handled in other courts.

Petitioners submit that concerns for state created rights involve more than a desire for efficiency. Much of the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co., supra*, centered on the question of limits. As set forth in the opinion, Congress' powers under Article I are limited by the powers granted to the judicial branch under Article III. The Court's concern about federal intrusion into state created causes of action indicates a recognition concerning the limits to which the national power should intrude into state interests. If efficiency were the only standard, petitioners submit that the Court would not have focused on the question of limits as it did. The system under scrutiny would have simply passed muster if it had been shown to be more efficient. As Senator Hatch's comments show, this Court's discussion of limits was on Congress' mind when it enacted BAFJA.

Although it was not expressly discussed in the legislative history found by the Petitioners, the nature of state created causes of action and the historic treatment of personal injury actions in the context of the debtor-creditor relationship provides another likely reason for congressional concern. State created causes of action, in large measure, represent the means by which individual rights and state policies are protected and furthered. It is true that the primary purpose of state-created tort actions is to adjust the rights and liabilities between parties. However, this does not diminish the fact that larger policies are also furthered. W. Keeton, *Prosser and Keaton on the Law of Torts*, § 3 (5th ed. 1984).

The historic treatment of personal injury claims within the debtor-creditor relationship illustrates the operation of state policies and interests. Under the laws of many states creditors could not attach or levy upon contingent, unliquidated personal

injury claims belonging to a debtor. Public policy disfavored allowing creditors to reap a windfall from a debtor's suffering. Note, *Creditor's Rights - Garnishment of Claims for Personal Injury - Property Vesting in the Bankruptcy Trustee*, 40 Tenn. L. Rev. 508 (1973).

Another reason behind such public policy can be seen from a consideration of incentives and societal costs. A creditor would not have any incentive to fully litigate the debtor's personal injury claim. His primary concern would be recovery of the amount of the debt. Any value beyond that would be of no concern to him since he would not be entitled to retain surplus. If a creditor were allowed to attach a debtor's unliquidated personal injury claim, the creditor would simply settle the claim for the amount of the debt. If the tort claim were worth substantially more than the debt, the tort feasor would have every incentive to settle. The debtor would be left with his injuries. Persons who provided medical treatment would go uncompensated. In addition, if the injuries had disabled the debtor, he would be left without a fund to provide for his support. As a result, society as opposed to the tortfeasor would shoulder the cost of the tortfeasor's wrongful acts. In effect, society would end up subsidizing the conduct.

The debtor, on the other hand, does not lose his incentive to litigate notwithstanding the fact that a creditor might be able to reach the proceeds once the claim has been liquidated. In that situation, the debtor knows that the recovery must exceed the amount of the debt before he can receive anything. This awareness creates a strong incentive for the debtor to try to maximize his recovery. Furthermore, since the debtor bears the costs of the action, he is more likely to make a more rational settlement decision than would a creditor.

Petitioners submit that one of the effects of the enactment of the Bankruptcy Code was to bring the treatment of personal injury claims into line with that given under state law. As stated

earlier, Petitioners would have had the right to be parties and to have their personal injury claim liquidated in a trial by jury under 28 U.S.C. § 1480 (See, pp. 12 and 13, supra.) However, under 11 U.S.C. § 541, the proceeds from the liquidation of the claim would go into the estate for purposes of administration. Having the proceeds handled in this fashion would have been similar to the ability of creditors reaching judgment proceeds under state law.

Under the Code as originally enacted petitioners would have had their trial in bankruptcy court. After *Northern Pipeline Construction Co. v. Marathon Pipeline Co., supra.* Congress had to modify the jurisdictional scheme to correct the defects found by this Court. As discussed earlier, one of these changes was to remove authority to liquidate personal injury claims from the bankruptcy court. Now disposition of these claims must occur elsewhere.

The position espoused by the Respondents and adopted by the Sixth Circuit represents a radical departure from the historic treatment of personal injury actions. This position effectively allows creditors acting through the trustee to sieze unliquidated personal injury claims. The trustee has the same incentive to settle the cause for the amount of the outstanding debts as creditors had under state law. 11 U.S.C. § 326 limits the trustee's basic compensation to a fixed percentage of the proceeds distributed to creditors. He gets nothing for any surplus returned to the debtor. As a result, he has no reason to try to maximize the recovery.

Such a position will hinder or defeat the state policies behind prohibiting creditors from reaching unliquidated personal injury claims. At the same time, leaving a debtor with nothing but his injuries would effectively defeat the federal policy of a fresh start for the debtor. Congress could not have intended such a result, especially in view of its express concerns about federalism as have been discussed above.

All of the foregoing demonstrates that petitioners have the right to remain as parties to the District Court action for their personal injuries and to have the case tried by a jury. It also establishes that the District Court's substitution order is appealable under the Collateral Order Doctrine. The nature of the right by itself justifies review. The rights involved can only be exercised at trial. They will lose all practical value unless exercised at that time. Rights of this nature have been considered to be sufficiently important to justify review under the collateral order doctrine. *Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 349 (1982); *Nixon v. Fitzgerald, supra*.

The substitution order will also effectively evade review unless heard at this time. Thus, all of the criteria have been met. *Firestone Tire & Rubber Co. v. Risjord, supra; Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). The record shows that Respondents intend to settle this case if they are successful in having Petitioners removed as parties. Such a disposition would prevent further review since Petitioners will not be able to appeal a settlement to which they are not even parties.

It is true that the Petitioners are still parties to the bankruptcy case and that they can appeal any adverse ruling of the Bankruptcy Court. However, this appeal involves an order entered by the District Court in connection with an action which originated and is pending there. As a result, it would never arise in the Bankruptcy Court, and therefore could not be raised in an appeal from that court.

CONCLUSION

For all these reasons, the Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

BURN & MEYER
150 Second Avenue North
Suite 315
Nashville, TN 37201
(615) 256-5555

BY: /s/ Michael A. Meyer

BY: /s/ David N. Burn

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5617

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs-Appellants,
Robert H. Waldschmidt, Trustee,
Plaintiff-Appellee,

v.

Commerce Union Bank, Clarksville, Tennessee; and
Kenneth C. Baines,
Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Tennessee.

Denied and Filed October 20, 1988

Before MARTIN and NELSON, circuit Judges, and EDWARDS, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge, Plaintiffs Charles and Nellie Bauer brought an "outrageous conduct" action against Commerce Union Bank of Clarksville, Tennessee, and one of its officers. The United States District Court for the Middle District of Tennessee entered an order substituting the Bauers' trustee in bankruptcy as plaintiff in their stead. The Bauers took an immediate appeal. We must decide whether the order is appealable at this stage, and if so, whether the district court erred in making the substitution. We conclude that the order is not immediately appealable, and that the district court committed no error in any event.

I

On February 15, 1985, the Bauers petitioned for bankruptcy under Chapter 7 of the Bankruptcy Code. The schedule of

assets filed with the bankruptcy court did not list any claim against the Commerce Union Bank or its officers. The court appointed Robert H. Waldschmidt as trustee. The debtors were discharged on June 4, 1985, and the case was closed.

On October 24, 1985, the Bauers commenced the present "outrageous conduct" action in the district court. Jurisdiction was predicated on diversity of citizenship. The complaint alleged that the bank's conduct in accelerating a certain promissory note executed by the Bauers and in foreclosing a second mortgage securing the note was "so extreme in degree as to go beyond all possible bounds of decency and so atrocious as to exceed all accepted limits observed by a civilized community." The allegedly tortious conduct of the bank was claimed to have subjected the Bauers to "extreme emotional and mental suffering."

The defendants moved for summary judgment on the ground that the cause of action asserted by the Bauers constituted property of the bankruptcy estate, which meant that the Bauers themselves had no standing to sue. The Bauers then moved to reopen their bankruptcy case. The latter motion was granted, and Mr. Waldschmidt was reappointed as trustee.

Mr. Waldschmidt proceeded to negotiate a settlement of the tort claim for $7,500. The Bauers objected to the compromise, but the bankruptcy court ultimately approved it, and the Bauers appealed to the district court.

In the meantime the district court ordered that Trustee Waldschmidt either join, authorize, or abandon the Bauers' "outrageous conduct" action. Waldschmidt requested that he be substituted for the Bauers as plaintiff. The district court granted the request on May 22, 1987, entering an order that made Waldschmidt the sole plaintiff. The Bauers have appealed from that order, and the defendants have moved that the appeal be dismissed for want of appellate jurisdiction.

II

Although 28 U.S.C. § 1291 generally limits appellate jurisdiction to appeals from "final decisions" of district courts, the "collateral order" doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), permits immediate appeal of a small class of prejudgment orders.

"To qualify as a collateral order, a decision must:

(i) 'conclusively determine the disputed question';

(ii) 'resolve an important issue completely separate from the merits of the action'; and

(iii) 'be effectively unreviewable on appeal from a final judgment.' "

Stringfellow v. concerned Neighbors in Action, 480 U.S. 370, ____, 107 S.Ct. 1177, 1181-82 (1987), quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Courts have repeatedly emphasized the narrowness of the collateral order exception to the final judgment rule. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1036 (1985).

Other court of appeals have held that orders substituting parties or permitting parties to intervene are interlocutory and nonappealable. See *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1325 (10th Cir. 1978); *In re Sylvania Electric Products*, 220 F.2d 423, 424 (1st Cir. 1955); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1962 (2d ed. 1986). We see nothing in the facts of the instant case to suggest that we ought to reach a different result here.

It is true that the district court's order does conclusively determine the disputed question of whether Waldschmidt is the proper person to prosecute the Bauers' tort action. It is also true that this question is separate from the merits of the tort ac-

tion. We are not persuaded that the question is an "important" one, however, because, for reasons discussed in the next section of this opinion, the argument that substitution was improper appears to border on the frivolous. Questions that obviously admit of only one answer, it seems to us, are not important enough to justify consideration in separate interlocutory appeals.

III

The Bauers contend that the substitution of Trustee Waldschmidt as plaintiff was improper because it deprived them of "their" right to a trial by jury. The argument is based on 28 U.S.C. § 1411(a), which reads as follows:

> "Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim."

The effect of this provision in the instant case is simply to insure that the tort claim belonging to the bankruptcy estate may be tried to a jury if such a trial is demanded by the person prosecuting the claim. The provision says nothing about whose claim it is, and the Bauers have advanced no reason for supposing that the claim is theirs individually. The Bankruptcy Code itself provides that the bankruptcy estate comprises "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), and it is well established that the "interests of the debtor in property" include "causes of action." *Grochenour v. Cleveland Terminals Building Co.*, 118 F.2d 89, 93 (6th Cir. 1941); *In re Ozark Restaurant Equipment Co.*, 816 F.2d 1222, 1225 (8th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 147 (1987).

It is equally clear that the trustee in bankruptcy acts as representative of the estate. It is the trustee who "has capacity

to sue and be sued." 11 U.S.C. § 323(b). See also Bankr. P. R. 6009. "It is well settled that the right to pursue causes of action formerly belonging to the debtor — a form of property 'under the Bankruptcy Code' — vests in the trustee for the benefit of the estate." *Jefferson v. Mississippi Gulf Coast YMCA*, 73 Bankr. 179, 181-82 (S.D.Miss. 1986). The debtor has no standing to pursue such causes of action. *Matter of Tvorik*, 83 Bankr. 450, 456 (Bankr. W.D.Mich. 1988).

The trustee is empowered to compromise causes of action belonging to the bankruptcy estate. While the trustee must give consideration to the debtors' interest in any surplus remaining after the payment of all debts, fees, and administrative expenses, see 11 U.S.C. § 726(a)(6), he must also protect the interests of unsecured creditors. Fully litigating a tort claim could easily exhaust assets that would otherwise go to creditors, and in the first instance the person vested with responsibility for deciding whether to settle or fight is the trustee, not the debtor.

The bankruptcy court must review any compromise, and the court is obligated to weigh all conflicting interests in deciding whether the compromise is "fair and equitable," considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. *In re American Reserve Corp.*, 841 F.2d 159, 161 (7th Cir. 1987). We may not assume, as the Bauers have assumed without any apparent justification, that the trustee has neglected his duties in this case and that the bankruptcy judge has "rubber stamped" an improvident compromise. Whether the compromise is improvident, moreover, is a question that can be reviewed on appeal to the district court and to this court.

Section § 1411(a) was not designed to limit the compromise of claims belonging to bankruptcy estates or to require that all such claims be litigated before a jury. If § 1411 had been intended to divest trustees in bankruptcy of control over all claims for wrongful death or personal injury, it would have worked an ex-

traordinary change in the treatment of debtors' property in bankruptcy. After reviewing the rather sparse legislative history of § 1411[1], we are satisfied that no such change was intended.

The trial court ordered Mr. Waldschmidt substituted as party plaintiff pursuant to Fed. R. Civ. P. 25(c), which permits the court to order substitution "[i]n case of any trnsfer of interest." Such orders are reviewed only for abuse of discretion. *R.J. Enstrom Corp. v. Interceptor Corp.*, 555 F.2d 277, 281 (10th Cir. 1977); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1962 (2d ed. 1986). Even if the order of substitution were immediately appealable, we would be unable to detect so much as a hint of any abuse of discretion here.

The defendants' motion to dismiss this case for want of appellate jurisdiction is GRANTED.

---

[1] No House or Senate report was submitted with the legislation, nor was there a Joint Explanatory Statement in the Conference Report. A House conferee referred to § 1411 in passing, stating that "in this narrow range of cases the parties do not *lose* any right to a jury trial that they may have had . . . ." 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier), *reprinted* in 1984 U.S. Code Cong. & Admin. News 579, 580. (Emphasis added.) In a statement on the floor of the Senate, the Chairman of the Senate Judiciary Committee paraphrased the language of the statute ("*do not affect* a right to trial by jury under applicable nonbankruptcy law") and summarized it by observing that "[n]ew *language* on the issue of jury trials is included." 130 Cong. Rec. S8887 (daily ed. June 29, 1984) (statement of Sen. Thurmon, *reprinted in* 1984 U.S. Code Cong. & Admin. News 581. (Emphasis added.) Senator DeConcini stated that "there was *no intent to alter or modify* the rights to jury trial that might have existed under the Reform Act." Statement of Senator DeConcini, III ABI Newsletter No. 3, at 3 (Winter 1984/85), quoted in *In re McCormick*, 67 Bankr. 838, 842 n.3 (D.Nev. 1986) (emphasis added).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:85-1241

IN RE:

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs

v.

Commerce Union Bank, Clarksville, Tennessee, et al.,
Defendants

Received: April 28, 1987

ORDER

Upon the motion of the trustee in bankruptcy, Robert H. Waldschmidt, and for other cause to the court shown;

IT IS HEREBY ORDERED that Robert H. Waldschmidt, Trustee for Charles W. Bauer, Jr. and Nellie P. Bauer (Case No. 385-00421, M.D. Tenn.), be, and is hereby substituted as the plaintiff in this proceding.

ENTER this 22nd day of May, 1987.

/s/ John T. Nixon
U.S. District Court Judge

APPROVED FOR ENTRY:

/s/
Attorney for Trustee
20th Floor, First American Center
Nashville, TN 37238

This document was entered on the docket in compliance with Rule 58 and/or 79(a), FRCP, on 5/22/87 By: DEB.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Docket No. 3-85-1241

Charles W. Bauer, Jr. and Nellie P. Bauer,

v.

Commerce Union Bank,
Clarksville, Tennessee, et al.

Received: March 30, 1987

ORDER

Pending before the Court is plaintiffs' motion to stay and withdraw order of reference. The Court, having reviewed the pleadings submitted by the parties, and after oral argument came to be heard on March 6, 1987, and for the reasons stated herein, hereby DISSOLVES the stay entered in this action pursuant to the terms stated below.

Plaintiffs assert in their motion that the trustees in the Bankruptcy court proceeding is exceeding his authority and the Order of this Court entered on June 26, 1986 by attempting to gain the approval of the Bankruptcy Court of a compromise and settlement of the lawsuit pending in this Court involving Commerce Union Bank. First, with respect to the trustee's authority, Rule 6009 of the Bankruptcy Rules provides: "With or without court approval, the trustee . . . may prosecute . . . any pending action or proceeding by . . . the debtor . . . in behalf of the estate before any tribunal." Second, in its Order entered on June 26, 1986, the Court stated: [The Bankruptcy court may take one of three actions: abandon the claim, authorize the plaintiffs to proceed on behalf of the creditors, or order the trustee to be joined as a party to this action." Pursuant to Rule 6009, the Court hereby AMENDS its earlier Order

and instructs the trustee to elect one of the above options within thirty (30) days of entry of this Order. Before seeking to obtain approval of the Bankruptcy Court for a compromise and settlement of an action, the trustee must first assume the prosecution of the action. At the end of the thirty (30) day period, the stay entered by the Court in its June 26 Order will be dissolved.

In instructing the trustee to make an election, the Court seeks only to clarify the status of a case pending before it. It does not seek to limit the Bankruptcy Court or the trustee's authority to act as it would have if the lawsuit now pending had been listed as an asset of the estate in the prior bankruptcy proceeding. The Court's June 26 Order should not be read as limiting the authority of the Bankruptcy court or the trustee to take whatever action pursuant to law that they deem appropriate to fully conclude plaintiffs' bankruptcy proceeding.

Entered this the 30th day of March, 1987.

/s/ John T. Nixon
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-85-1241
June 26, 1986
Nashville, Tennessee
3:10 p.m.

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs,

v.

Commerce Union Bank,
Clarksville, Tennessee, et al.,
Defendants.

Transcript of Proceedings
Before the Honorable John T. Nixon

APPEARANCES:

For the Plaintiffs: Mr. Michael A. Meyer
Mr. David Burn
Attorneys at Law
Nashville, Tennessee

For the Defendants: Mr. L. Webb Campbell, II
Attorney at Law
Nashville, Tennessee

PROCEEDINGS

THE COURT: The parties know what the Court's ruling is in this case. I'll go ahead and state the reasoning with regard to the motion for summary judgment.

The facts are not in dispute. The action arises out of an allegedly wrongful foreclosure by defendants of a house owned

by the plaintiffs; that the plaintiffs purchased the house in 1962, took out a second mortgage with the defendants in 1983.

In October 1984 the payment was late. The bank refused to accept the payment, accelerated the note and foreclosed, and in February of 1985 plaintiff filed for bankruptcy and a discharge was granted in June 1985, and then this action was initiated in October 1985.

The case is similar to two of the Sixth Circuit cases. In *Management Investors v. United Mine Workers*, 610 F.2d 384 (6th Circuit 1979), plaintiff was a coal hauler who was picketed by the United Mine Workers. Shortly after the picketing occurred, he petitioned for bankruptcy and his debts were discharged." He did not list as an asset the cause of action against the union for damage resulting from picketing.

After the discharge, he sued the union, which responded by moving for summary judgment on the ground that the action could be brought only by the trustee. The trial court granted the motion, and the Sixth Circuit affirmed.

In *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d 95 (6th Circuit 1975), the Sixth Circuit articulated similar rules of law as in the other case but applied them to a different situation.

Plaintiff had been assigned the right to bring an action for patent infringement by a company that was going through a bankruptcy. The cause of action was not listed as an asset of the company and the proceeding was closed before plaintiff brought suit. The trial court granted defendant's motion to dismiss on the ground that plaintiff lacked standing, and the Sixth Circuit affirmed.

The Court observed that the trustee was vested with a cause of action once the bankruptcy proceeding was initiated and noted the doctrine of abandonment was inapplicable to unlisted assets.

Finally, turning to consider how the district court should proceed, it did not discuss the three alternatives articulated in *Management Investors*. Instead, it recognized only that some action by the bankruptcy court was required before the action could go forward: "When new assets are discovered following the close of a bankruptcy case, the proper procedure is to apply to the bankruptcy court to reopen the case pursuant to Bankruptcy Rule 515, for administration of the assets. If the case is reopened the bankruptcy court would then have an opportunity to appraise the unscheduled assets and decide whether they should be administered or abandoned.

The Court concluded plaintiff does not have standing to sue in his own behalf for any claim for damages owned by the company.

In sum, the *Management Investors* and *Scharmer* decisions indicate that defendants' motion for summary judgment in the instant case should be granted, but the Court has discretion either to dismiss the case or to stay the proceedings pending action by the defendants to reopen their bankruptcy proceeding.

If a stay is granted, the bankruptcy court may take one of three actions: abandon the claim, authorize the plaintiffs to proceed on behalf of the creditors, or order the trustee to be joined as a party to this action.

So I'm going to grant the motion and stay the proceedings pending action by the defendants to reopen their bankruptcy proceeding.

(Proceedings adjourned at 3:15 p.m.)

CERTIFICATE

This is to certify the foregoing transcript is true and accurate to the best of my ability

Gene A. Jennings Date

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action File No. 3-85-1241

Jury Demand

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs,

vs.

Commerce Union Bank, Clarksville, Tennessee; and
Kenneth C. Baines,
Defendants.

COMPLAINT

(Filed Oct. 24, 1985)

Comes now the plaintiffs, through their attorneys, and would show this Honorable Court as follows:

I - JURISDICTION AND VENUE

1. Plaintiffs are citizens of the State of Alabama, Defendant Baines is a citizen of the State of Tennessee and Defendant Commerce Union Bank, Clarksville, Tennessee is a banking corporation organized and chartered under the laws of and having its principal office in the State of Tennessee. The amount in controversy exceeds, exclusive of interest and costs, the sum of ten-thousand ($10,000) dollars.

2. Venue properly lies in the Nashville Division of the Middle District of Tennessee because the Defendants reside therein.

II - PARTIES

3. Plaintiffs Charles W. and Nellie P. Bauer are husband and wife and adult citizens of the State of Alabama. They reside at 7259 Lakewood Road, Mobile, Alabama 36609.

4. Defendant Commerce Union Bank, Clarksville, Tennessee is a banking corporation organized and chartered under the laws of Tennessee. Its principal office is located at 215 Legion Street, Clarksville, Tennessee, 37040. Ben S. Kimbrough is its registered agent for service of process. He may be served with process at Defendant's principal office.

5. Defendant Kenneth C. Baines is employed as an Assistant Vice President in charge of Special Assets by Defendant Commerce Union Bank, Clarksville. He may be served with process at 215 Legion Street, Clarksville, Tennessee 37040.

III - FACTUAL BACKGROUND

6. In 1962 plaintiffs purchased a residence located at 12 Gettysburg Drive, Clarksville, Tennessee (the "Residence") and with the exception of temporary transfers, lived there on a continuous basis until early February, 1985. During the period between 1975 and February, 1985, Plaintiffs lived in the Residence with Julia Meeks, Nellie Bauer's mother, and during the latter part of this period plaintiffs' oldest daughter, Kathy Black, and her two children also lived in the residence.

7. In April, 1983 plaintiffs obtained a sixteen-thousand, five-hundred ($16,500) dollar loan from Defendant Commerce Union Bank which was secured by a second mortgage on the Residence (the "House Note") and co-signed by a third party with whom Defendant Commerce Union Bank, Clarksville had numerous prior dealings.

8. In June, 1983 Plaintiffs sold a 1982 Ford Escort automobile (the "Car") owned by their daughter and financed through Defendant Commerce Union Bank, Clarksville. Plain-

tiffs had co-signed a note (the "Car Note") which was secured by the Car. At the time of the sale, Defendant Baines represented to Nellie Bauer, or otherwise led her to believe, that she and Charles Bauer would be released from liability as co-signers on the Car Note upon consummation of the transaction.

9. The buyer of the Car subsequently defaulted upon payment of the Car Note and Defendant Baines demanded payment in full on the note in the amount of four-thousand, six-hundred ($4,600) dollars from Plaintiffs. After Charles Bauer refused to make said payment, Defendant Baines reminded Charles Bauer that Defendant Commerce Union Bank, Clarksville held the House Note and that because Charles Bauer refused to make said payment, Defendant Baines would "get" the Residence, or words to that effect.

10. From the time Plaintiffs had obtained the House Note until Defendant Baines made said demand and threat, Plaintiffs had the proceeds from Charles Bauer's military pension deposited directly into an account with Defendant Commerce Union Bank, Clarksville. Upon receipt of such funds, Defendant Commerce Union Bank, Clarksville would withdraw an amount equal to the monthly installment due on the House Note. After Defendant Baines made the threat, Plaintiffs, on the advice of an attorney, closed the account with defendant Commerce Union Bank, Clarksville and began making payments on the House Note through drafts and checks.

11. From March, 1983 through September, 1983 Plaintiffs made their regular payments of two-hundred ($200) dollars per month on the House Note. In addition, Plaintiffs made a payment of approximately nine-thousand ($9,000) dollars in May, 1983 which reduced the outstanding indebtedness to approximately eight-thousand ($8,000) dollars. Due to oversight, Plaintiffs were approximately one month late with their October, 1984 payment. They tendered this payment plus the ten ($10) dollar late charge on November 5, 1984 and made their

November payment three (3) days later. Said November payment was timely, since defendant Commerce Union Bank, Clarksville did not consider a payment to be late until it was made after the 16th of the month. Upon learning of the late tender of the October payment, Defendant Baines directed that both the October and November payments be refused. On November 9, 1984 Defendant Baines directed that a cashier's check in the amount of four-hundred, ten ($410) dollars, representing the total amounts of the Plaintiffs' October and November payments plus the October late charge, be drawn and sent to Plaintiffs.

12. On or about November 30, 1984 Defendants told Plaintiffs that the House Note was accelerated and that if Plaintiffs could not pay the entire amount due on the House Note, that Plaintiffs would have to vacate the Residence. Although Plaintiffs could have continued to make the monthly payments due on the House Note, they could not pay the entire amount due.

13. Defendants did not contact the co-signer after the Defendants accelerated the House Note and they made no attempts to collect the amount allegedly due and owing on the House Note from said co-signer. Defendants also failed to notify the holder of the first mortgage on the Residence and have instead made the monthly payments thereon.

14. Defendants originally set December 28, 1984 as the date that Plaintiffs were to vacate the Residence. Defendants subsequently extended this date to January 28, 1985 and granted another one week extension because of bad weather. Plaintiffs vacated the Residence on February 3, 1985 and left behind most of their household furnishings and some personal property. Plaintiffs moved to Mobile, Alabama, and took with them their clothing, and some other personal property, one bedroom set and sixty ($60,00) dollars in cash.

IV - CAUSE OF ACTION

15. Defendants' acceleration of the House Note and order to Plaintiffs to vacate the Residence constituted outrageous conduct, so extreme in degree as to go beyond all possible bounds of decency and so atrocious as to extend all accepted limits observed by a civilized community. As Defendants well knew, they were legally bound to accept Plaintiffs' tender of full payment of the amount past due on the House Note. They ignored said obligation and instead acted vindictively because of Plaintiffs' refusal to pay the Car Note and not for purposes of protecting their legitimate business interest.

16. Defendants were well aware of Plaintiffs' situation. They knew or should have known that their order to Plaintiffs to vacate the Residence would subject Plaintiffs to extreme emotional and mental suffering. Defendants' actions under such circumstances were done intentionally or with reckless disregard of the consequences.

17. As a result of Defendants' extreme and outrageous conduct, Plaintiffs suffered the extreme humiliation of being driven from their home and from the State of Tennessee. They have been forced to endure, in their mind, the stigma and shame of Bankruptcy and they have suffered extreme mental and emotional distress from seeing their family torn apart. Julia Meeks suffered shock and distress at being uprooted from the Residence and placed in unfamiliar surroundings and, as a result, Plaintiffs had to put her in a nursing home. Their daughter, Kathy Black, after being driven from the Residence was unable to support her two young sons and had to send them to her sister's home in North Carolina, thus further breaking the family apart. In addition, as a result of Defendants' extreme and outrageous conduct, and the effects which it had on her family, Nellie Bauer has suffered an angina attack which damaged forty percent (40%) of her heart and other physical ailments which have required medical treatment and will con-

tinue to require such treatment into the future. She also suffred, and is continuing to suffer, severe emotional distress as a result of Defendant's extreme and outrageous conduct. Charles W. Bauer likewise suffered, and is continuing to suffer, severe emotional distress as a result of said conduct and its effects.

V - PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS PRAY:

1. That service of process issue from this Honorable Court and that Defendants be compelled to answer the allegations set forth herein;

2. That Plaintiffs be awarded compensatory and punitive damages in the amount of Five-Million ($5,000,000) dollars, or any other amount as is proven at trial;

3. That this Honorable Court grant such other relief, legal or equitable as the interests of justice may require;

4. That the issues so joined in this cause be TRIED BEFORE A JURY.

Respectfully submitted,

Burn & Meyer
172 Second Avenue North
Suite 202
Nashville, TN. 37201
(615) 256-5568

BY: /s/ David N. Burn

BY: /s/ Michael A. Meyer

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-85-1241

Judge Nixon
Jury Demand

rec'd 12/13/85

Charles W. and Nellie P. Bauer,
Plaintiffs,

v.

Commerce Union Bank, Clarksville, Tennessee and
Kenneth C. Baines,
Defendants.

SCHEDULING ORDER

The following constitutes the Scheduling Order filed in the above-captioned case through plaintiff's counsel, Michael A. Meyer, with the advice and consent of defendant's counsel, H. Frederick Humbracht, Jr.

I.

This Court has jurisdiction pursuant to 28 U.S.C. §1332. The jurisdiction of the Court is not contested.

II.

The joinder of parties will not be permitted after December 15, 1985.

III.

The filing of motions to amend the pleadings will not be permitted after January 3, 1986.

IV.

The filing of discovery motions to amend the pleadings will not be permitted after January 3, 1986. All dispositive motions must be filed by April 28, 1986.

V.

All pre-trial discovery must be completed by May 7, 1986.

VI.

The discovery in this cause is expected to proceed as follows: The plaintiffs have previously filed a first set of interrogatories and request for production of documents; counsel for plaintiffs and defendants will file other discovery requests prior to the cut-off date. The parties will cooperate with regard to the timing and scheduling of discovery matters, including but not limited to, cooperating in making witnesses available.

VII.

The date for submission of a final pre-trial order and final pre-trial conference shall be June 11, 1986 at 8:45 a.m.

VIII.

The trial date shall be June 16, 1986 at 9:00 a.m. Counsel for plaintiffs and defendants estimate that trial of this cause shall be approximately four days in duration.

IT IS SO ORDERED, this _____ day of December, 1985.

/s/ (illegible)
United States District Judge

APPROVED BY:

/s/ Michael A. Meyer
Attorney for Plaintiffs
Burn & Meyer
172 Second Avenue North, Suite 202
Nashville, Tennessee 37201
615-256-5568

/s/ H. Frederick Humbracht, Jr.
Attorney for Defendants
Dearborn & Ewing
Suite 1200, One Commerce Place
Nashville, Tennessee 37239
615-259-3560

APPENDIX G

TRANSMISSION FORM

District Court — District Court No. 3:85-1241-N

Middle District of Tennessee — Court of Appeals No. 87-5617

CAPTION CURRENT COUNSEL FOR PLAINTIFF

(Include names of all plaintiffs and defendants who are parties to the appeal. Use separate sheet if necessary)

1) Charles W. Bauer, Jr.

2) Nellie P. Bauer
Substituted as pltf
5/22/87 order:

Robert H. Waldschmidt
Plaintiff-Appellants

v.

1) Commerce Union Bank, Clarksville, TN
2) Kenneth C. Baines

*Michael Biggs
(added 1/6/86)
Defendant-Appellees

Current Counsel for Plaintiff

Name: David Burn;
Michael Meyer
Firm Name: Robert H. Waldschmidt
Howell Fisher Branham North
Address: 172 Second Ave. N.;
Suite 202
Nashville, TN 37201
Telephone: (615) 256-5568

Current Counsel for Defendant

Name: H. Frederick Humbracht
Craig J. Donelson
L. Webb Campbell, II
Firm Name: Dearborn & Ewing
Address: Suite 1200;
One Commerce Pl.
Nashville, TN 37239
Telephone: SSN (CJA only)

If Habeas Corpus (28 U.S.C. §2254), was Certificate of Probable Cause:

[ ]granted [ ]denied [ ]pending

Criminal Defendant: [ ]on bond [ ]incarcerated [ ]on probation

Fees: District Court Filing
Fee Paid: [X]yes [ ]no
Court of Appeals
Docket Fee Paid: [X]yes [ ]no
Pauper Status: [ ]granted [ ]denied [ ]pending
Affidavit of Financial
Status Filed: [ ]yes [ ]no

Counsel: [ ]appointed [ ]retained

District Court Judge John T. Nixon
Court Reporter Vowell & Jennings

Any hearing or trial [X]yes [ ]no If yes, dates 6/11/86; 3/6/87

FROM Betty Harris
Deputy Clerk

DATE June 1, 1987

THIS PORTION FOR USE IN TRANSMITTING ANYTHING AFTER THE ORIGINAL NOTICE OF APPEAL HAS BEEN SENT

Date Notice of Appeal sent to Court of Appeals _____

The new information sent at this transmittal is _____ and includes an updated copy of docket entries.

I hereby certify that I have transmitted to the United States Court of Appeals for the Sixth Circuit the annexed documents consisting of 1 volume(s) of pleadings, 2 volume(s) of transcript and 0 volume(s) of depositions, which constitute the CERTIFIED RECORD ON APPEAL, this 4th day of August, 1987.

/s/ Betty Harris
Deputy Clerk,
United States District Court

Plaintiffs	Defendants
Charles W. Bauer, Jr. Nellie P. Bauer	Commerce Union Bank, Clarksville, Tennessee; and Kenneth C. Baines

Substituted as pltf per order 5-22-87
Robert H. Waldschmidt, *Biggs, Michael (asst. cashier, CUB

*ADDED 1-6-86

CAUSE

(Cite The U.S. Civil Statute Under Which The Case Is Filed And Write A Brief Statement Of Cause)

28 USC 1332. This action is based on state law tort of outrageous conduct infliction of emotional distress

ATTORNEYS

Plaintiff	Defendant (1 & 2)
David Burn Michael Meyer 172 Second Avenue, North Suite 202 Nashville, Tn. 37201 (615) 256-5568	H. Frederick Humbracht Craig J. Donelson L. Webb Campbell, II DEARBORN & EWING Suite 1200; One Commerce Pl Nashville, TN 37239 (615) 259-3560

? as to including address 5-22-87
Robert H. Waldschmidt
20th Fl. 1st American Center
Nashville, Tn 37238

NEW MAILING ADDRESS 6-22-87

Robert H. Waldschmidt
HOWELL FISHER BRANHAM & NORTH
Court Square Bldg.,
300 James Robertson Parkway
Nashville, Tn 37201
(615) 244-3370

Certified Rec. to 6CCA - 8-4-87
Short Rec. to 6CCA - 6-1-87
NOA by 5-27-87

FILING FEES PAID

DATE	RECEIPT NUMBER	O D NUMBER
10-24-85	#008472 ($60.00)	
5-27-87	Burn & Meyer $105.00	#14352

Statistical Cards

Date Mailed: 10-24-85

PROCEEDINGS

Charles W. Bauer, Jr., et al, Plaintiff

Commerce Union Bank, et al, Defendant

1-24-85	1	Complaint. Summons issued
0-30-85		R/S on Ben Kimbrough by certified mail on 10-25-85. bv
1-4-85		R/S on Kenneth C. Baines by certified mail on 10-25-85. bv
1-13-85	2	Answer of dfdts Commerce Union Bank, Clarksville, TN ("CUB-C") and Kenneth C. Baines. bv
2-16-85	3	Motion To Amend Complaint (Re #9) db
2-16-85	4	Memorandum in Support of Pltfs' Motion for Leave to amend the Complaint
2-23-85	5	Scheduling Order: The date for submission of a final pre-trial order & final pre-trial conference shall be 6-11-86 at 8:45 a.m. The trial date is 6-16-86 at 9:00 a.m. **Case Notice No. 1** (EOD 1-3-86) db
2-23-85	6	Agreed Order: The defts are given until Mon. 12-20-85 to respond to pltfs' requests for production **Case Notice No. 2** (EOD 1-3-86) db
12-30-85	7	Defts' Motion to Dismiss db
12-30-85	8	Memorandum of authority in support of defts' motion to dismiss db
1- -86	9	Order: Motion to Amend Complaint, **Granted Case Notice No. 3** (EOD 1-8-86) Re #3) (copy of original complaint attached)
1-9-86	10	Pltfs' motion for costs & attnys fees. c/s. bsw
1-9-86	11	Pltfs' reply memorandum in opposition to defts' motion to dismiss & memorandum of law in support of their rule 11 cross-motion. c/s.bsw
1-23-86		R/S of Summons on Michael Biggs executed on 1-15-86 (ret. receipt card signed (illegible) on 1-17-86) Summons was not issued, no signature date from clerk's office db

1-23-86	12	Defts' Response to pltfs' reply Memorandum opposing defdts' mtn to dismiss db
1-23-86	13	Memorandum in Support of Motion to Dismiss the Amended Complaint db
1-23-86	14	Deft's Request for Oral Argument db
2-5-86	15	Reply Memorandum of Pltf in Opposition to Defts' Motion to Dismiss the Amended Complaint. meh
2-5-86	16	Reply of Pltf to Defts' Response to Pltfs Reply Memorandum. meh
2-5-86	17	Opposition of Pltfs to Request for Oral Argument. meh
3-21-86	18	Motion For Leave To Serve Interrogatories & Requests For Production Of Documents On Deft Commerce Union Bank. pac (ref: 4-9-86)db
4-9-86	19	Order: Mtn for Leave to serve interr. & request for production of doc. on deft CUB, Granted (EOD 4-11-86) db
4-15-86	20	**Memorandum** of the Court. (EOD 4/17/86)meh
4-15-86	21	**Order:** For the reasons discussed in the memorandum, the Court **Denies** defts' motion to dismiss, **Denies** both pltfs' and defts' motions for costs and attys' fees and **Denies** defts' motion for oral argument. (EOD 4/17/86) meh
4-28-86	22	**Motion** by Defts to Modify Scheduling Order. (Ref: 5-12-86) Re #28 meh
4-28-86	23	**Motion** by Defts for Summary Judgment. meh
4-28-86	23	**Memorandum** in Support of Motion for summary Judgment. w/attachments. meh
4-28-86	25	**Statement** of Material Facts as to Which There is no Genuine Issue to Be Tried. meh
5-8-86	26	Notice Of Deposition by pltfs of Julia Meeks at 2:30 pm on Wed. 5-21-86; Brickner Truschell, M.D. at 1:30 pm on Thurs 5-22-86; Harold Sutter, M.D. at 11:00 a.m on Fri. 5-23-86 db

5-8-86	27	Pltf's Motion to Modify scheduling Order (Re #31) db
5-12-86	28	Order: Defts' Motion to Modify scheduling order, Granted. (Re #22) (EOD 5-12-86) db
5-14-86	29	**Answer** of deft Michael Biggs db
5-15-86	30	Pltf's **Memorandum** in Opposition to defts' Mtn for S/J db
5-22-86	31	**Order:** Pltf's Mtn to Modify Scheduling Order, Granted (Re #27) (EOD 5-23-86) db
5-23-86	32	Defts' Reply to Pltfs' Memorandum in opposition to Defts' Mtn for S/J db
6-4-86	33	Motion for oral argument db
6-4-86	34	Pltfs' Reply Memorandum in opposition to defts' mtn for Summary Judgment db
6-4-86	35	Pltf's Notice of filing documents. (cys attached)db
6-6-86	36	Pltf's Witness list db
6-6-86	37	Opposition to motion for oral Argument db
6-11-86	38	Clerk's Resume of 6-11-86: Martha Davis., Ct/Reporter; Mtn to dismiss db
6-30-86	39	Pltf's Motion to Amend Order db
6-30-86	40	Deft's Response to Pltf's Motion to Amend Order db
7-1-86	41	Transcript of Proceedings of 6-26-86 db
7-15-86	42	Reply Memorandum of Pltf. meh
2-11-87	43	Motion to lift stay & Withdraw order of reference db
2-11-87	44	Pltfs' Memorandum in support of their mtn to lift stay & withdraw ref. to the Bkruptcy Court db
2-11-87	45	Notice of filing documents in support of pltfs' mtn to lift stay & to withdraw order of reference db
2-23-87	46	Notice of Filing Additional Documents in support of pltfs' mtn to stay & to withdraw order of reference (Expedited Hearing Requested) (exhibts, #8,9&10) db

3-3-87	47	Response of CUB, Clarksville TN to pltfs' Mtn to lift Stay & withdraw order of reference. db
3-3-87	48	CUB, Clarksville, TN Memorandum in opposition to pltfs' mtn to Lift Stay & withdraw order of ref. db
3-6-87	49	Clerk's Resume of March 6, 1987 - Motion to lift stay and withdraw order of reference: U/A. pc
3-11-87	50	Motion to Stay Bkrptcy Proceedings by pltfs. pending the disposition of the motions which are presently before the crt. pc
3-30-87	51	Order: Pending before the Court is pltfs' mtn to stay & withdraw order of reference. The Court, having reviewed the pleadings submitted by the parties & after oral argument came to be heard on 3-6-87 & for the reasons stated herein, hereby DISSOLVES THE stay entered in this action pursuant to the terms stated ... in its Order entered on 6-26-86 the Court stated: The Bakruptcy Court may take one of three actions: abandon the claim, authorize the pltfs to proceed on behalf of the creditors, or order the trustee to be joined as a party to this action ...the Court hereby AMENDS its earlier Order & instructs the trustee to elect one of the above options within 30 days of entry of this Order. Before seeking to obtain approval of the Bkruptcy Court for a compromise & settlement of an action, the trustee must 1st assume the prosecution of the action. At the end of the 30 day period, the stay entered by the Court in its June 26 Order will be dissolved. ... (EOD 4-1-87) db
4-7-87	52	Plaintiffs' Motion to Amend Order entered 4/1/87. pc
4-17-87	53	Commerce Union Bank's MOTION to Clarify Order. pc

4-27-87	54	Order: Pending before the Court are mtns to clarify & amend the Court's Order of 3-30-87 by pltf's & deft. These mtns are hereby DENIED, except that the trustee shall make his election within 15 days of entry of this ORDER. (EOD 4-28-87) db
4-28-87	55	Motion to Intervene by trustee Robert H. Waldschmidt. pc
4-29-87	56	Pltf's Response to the Trustee's Motion to Intervene. pc
5-22-87	57	Order: Upon the mtn of the trustee in bankruptcy, Robert H. Waldschmidt & for other cause to the court shown; it is ORDERED that Robert H. Waldschmidt, Trustee for Charles W. Bauer, Jr. & Nellie P. Bauer (Case #385-00421, M.D. TN) be & is hereby substituted as the pltf in this proceeding. (EOD 5-22-87) db
5-27-87	58	Notice of Appeal by pltfs. from 5/22/87 order substituting Robt. Waldschmidt for Charles & Nellie Bauer (EOD 5/22/87) C/S bh
5-28-87	59	Motion For Stay by pltfs. pending appeal. C/S. bh
6-1-87		Short Record to 6CCA. Copy of NOA, docket sheet & transmission form to David Burn, Michael Meyer, Robt. Waldschmidt; H. Frederick Humbracht; Craig Donelson; L. Webb Campbell, II & Bankruptcy Court. bh
6-1-87		Transcript order: Judge Nixon's 4/26/86 bench ruling; 3/6/87 oral argument & motion to withdraw order of reference. bh
6-8-87	60	Order: Pltf's Mtn for Stay pending appeal to 6CCA, GRANTED. (EOD 6-9-87) bh
6-8-87		6CCA assigned #87-5617. bh
7-22-87	61	Transcript of Proceedings before J. Nixon on May 11, 1986. pc

8-4-87	Certified Record to 6CCA. Copy of docket sheet & transmission form to David Burn, Michael Meyer, Robt. Waldschmidt; H. Frederick Humbracht; C. Donelson; L. Webb Campbell, II & Bankruptcy Court. bh

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 385-00421
Judge Paine

In Re:

Charles W. Bauer a/k/a Charles W. Bauer, Jr.;
Charles William Bauer, Jr.; and Nellie P. Bauer
a/k/a Nellie Patrick Bauer,
Debtors.

DEBTORS' MOTION TO REOPEN BANKRUPTCY ESTATE

Come now the debtors, Charles W. and Nellie P. Bauer, through counsel and pursuant to 11 U.S.C. §350(b) and Bankruptcy Rule 5010, move to reopen their bankruptcy estate. In support thereof, debtors would show as follows:

1. Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§1, *et.seq.* on February 15, 1985. After the filing of such petition, this Honorable Court appointed Robert Waldschmidt, Esquire to act as trustee for the estate. On June 4, 1985 this Honorable Court discharged the debtors. On or about June 21, 1985 this Honorable Court entered an Order closing the estate and discharging the trustee.

2. On October 24, 1985 debtors instituted proceedings against Commerce Union Bank, Kenneth C. Baines and Michael Biggs in the United States District Court for the Middle District of Tennessee, Nashville Division (the "action"). A copy of the Complaint is attached hereto as Exhibit A. The action is based upon conduct which occurred before debtors filed their petition in Bankruptcy.

3. Debtors failed to list the action on the schedules attached to their Petition. Such omission was due to the fact that debtors did not become fully aware of the action until after the discharge had been granted.

4. On or about November 15, 1985 debtors discovered that the bankruptcy estate had an interest in any judgment which might be recovered in such action. At that time debtor's counsel contacted Mr. Waldschmidt by telephone, advised him that debtors had filed suit and stated that debtors had no objection to intervention by the estate. Counsel also stated his willingness to account to the estate for any proceeds from any judgment. Debtors' counsel followed up said telephone conversation by a letter dated November 18, 1985. A copy is attached hereto as Exhibit B. Mr. Waldschmidt responded to such letter by a letter dated November 25, 1985. A copy of that correspondence is attached as Exhibit C.

5. Based upon Mr. Waldschmidt's response, debtors proceeded with the action based upon the understanding that they would be accountable to the estate for any judgment which they might obtain. They have engaged in discovery and other preparation for trial at their own expense. At the present time, the case is ready for trial.

6. On June 18, 1986 the United States District Court for the Middle District of Tennessee, Nashville Division advised the parties to the action that the proceedings would be stayed in order to allow debtors to file a motion to reopen the bankruptcy estate. Such stay was entered in response to a Motion for Summary Judgment filed by the defendants.

7. The action constitutes an asset of the estate which has never been administered. In view of the nature of the action, the creditors as a class and the debtors will benefit if a judgment is obtained against defendants in that the action, if successful, might generate sufficient funds to satisfy the claims of the creditors and possibly return surplus to the debtors.

PREMISES CONSIDERED, Debtors move:

1. That this Honorable Court reopen debtors' estate to administer this asset as the Court deems appropriate;

2. That this Honorable Court authorize debtors and their counsel to bring the action for the benefit of the estate;

3. For any other relief as the Court deems appropriate.

Respectfully submitted,

BURN & MEYER
172 Second Avenue North
Suite 202
Nashville, Tn. 37201
(615) 256-5568

By: /s/ David N. Burn

By: /s/ Michael A. Meyer
ATTORNEYS FOR DEBTORS

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Debtor's Motion to Reopen Bankruptcy Estate has been mailed, postage prepaid, to Robert H. Waldschmidt at Cosner & Waldschmidt, 20th Floor, First American Center, Nashville, Tennessee this 20 day of June, 1986.

/s/ Michael A. Meyer

APENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Case No. 385-00421

In Re:

Charles W. Bauer, Jr. and Nellie P. Bauer,
Debtors

Filed: September 19, 1986, 4:27 p.m.

NOTICE OF PROPOSED COMPROMISE
AND SETTLEMENT

Comes now the trustee, Robert H. Waldschmidt, in the above-captioned cause, and gives notice that, unless an objection and request for a hearing is filed within twenty (20) days of the date of this notice (and a copy served upon the trustee at the address below) the trustee will accept the offer of settlement made by Commerce Union Bank of Clarksville for the compromise of all claims the bankrupt estate may have against Commerce Union Bank of Clarksville.

The terms of the settlement are as follows:

1. Commerce Union Bank of Clarksville shall pay to the trustee the sum of $7,500.

2. Commerce Union Bank of Clarksville shall withdraw any unsecured claim they have in this proceeding, and shall not be entitled to any distribution from the bankrupt estate.

3. On behalf of the bankrupt estate, the trustee shall release all claims the estate has against Commerce Union Bank of Clarksville.

If no objections are received to this compromise, an appropriate agreed order will be submitted to the court settling the trustee's claims upon the terms outlined above.

DATED: September 19, 1986.

RESPECTFULLY SUBMITTED,
/s/ Robert H. Waldschmidt, Trustee
Cosner & Waldschmidt
20th Floor, 1st American Center
Nashville, TN 37238

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent to the debtor; the debtor's attorney; all creditors; Craig J. Donaldson, Dearborn & Ewing, One Commerce Place, Suite 1200, Nashville, TN 37239; and to Burn & Meyer, 172 Second Avenue, North, Suite 202, Nashville, TN 37201, by U.S. Mail, postage prepaid, this 18th day of September, 1986.

/s/ Robert H. Waldschmidt

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-85-1241

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs,

v.

Commerce Union Bank,
Clarksville, Tennessee, et al.,
Defendants.

EXPEDITED ORAL ARGUMENT REQUESTED

Judge Nixon

MOTION TO LIFT STAY AND WITHDRAW ORDER OF REFERENCE

Plaintiffs, through their attorneys, move this Honorable Court to lift the stay of proceedings which was entered in this cause pursuant to an Order dated June 26, 1986 and to Order the withdrawal from the Bankruptcy Court of all matters relating to the disposition of this cause on its merits. In support of this motion, plaintiffs would show this Honorable court as follows:

1. The ends to be accomplished by the stay have been met in that the bankruptcy estate is in such a posture as to enable it to be properly represented in this cause;

2. Withdrawal of this case pursuant to 28 USC § 157(d) is appropriate in that the Bankruptcy Court lacks authority to render a final judgment or to otherwise make a disposition on the merits of this cause based upon 28 USC § 157(b)(5) and the principles set forth in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 72 L.Ed.2d 598 (1982).

Alternatively, if this Honorable Court finds that, based upon Rule 6(a)(3) of the Local Rules of the Middle District of Tennessee and *NLT Computer Corp. v. Capital Computer Systems, Inc.*, 755 F.2d 1253 (6th Cir. 1984), the matters raised in paragraph 2 are not properly before this Court, plaintiffs respectfully request that this Honorable Court transmit this Motion to the Clerk for assignment pursuant to Rule 6(a)(3) of the Local Rules of the Middle District of Tennessee.

Transmitted contemporaneously herewith are a Memorandum of Law in support of this Motion, a notice of filing documents and the documents described in such notice.

Respectfully submitted,

BURN & MEYER
172 Second Avenue North
Suite 202
Nashville, TN 37201
(615) 256-5568

Plaintiffs' Attorneys

By: /s/ David N. Burn

By: /s/ Michael A. Meyer

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon the defendants by hand delivery of a copy of the same to Linda W. Knight, Esq., Gullett, Sanford, Robinson & Martin, Metropolitan Federal Building, 3rd Floor, Nashville, Tennessee; Craig J. Donaldson, Esquire, Dearborn & Ewing, Suite 1200, One Commerce Place, Nashville, Tennessee; and to Robert H. Waldschmidt, Chapter 7 Trustee, Cosner & Waldschmidt, 20th Floor, First American Center, Nashville, Tennessee 37238, and by mailing a copy of the same to Henry E. Hilderbrand, Chapter 13 Trustee, PO Box 2601, Nashville, Tennessee, this 11th day of February, 1987.

/s/ Michael A. Meyer

APPENDIX K

Exhibit A to Reply Memorandum

Burn & Meyer

Attorneys at Law

172 Second Avenue North, Suite 202

Nashville, Tennessee 37201

November 18, 1985

Robert H. Waldschmidt, Esquire
Attorney at Law
20th Floor, First American Center
Nashville, Tennessee 37238

RE: *Bankruptcy of Charles W. and Nellie P. Bauer*, Case No. 385-00421

Dear Mr. Waldschmidt:

This is to confirm our November 15 telephone conversation. At that time I notified you that I represent Mr. and Mrs. Bauer in connection with a lawsuit filed against Commerce Union Bank of Clarksville. I did so because as Trustee in the above-referenced Bankruptcy, you would have an interest in at least part of any judgment obtained against Commerce Union. Accordingly, I informed you that we would not object should you decide to intervene or, if you agreed, we would handle the case and account to you for any proceeds owing to the Estate. You stated that the latter would be acceptable to you.

During our conversation I forgot to mention the fee arrangement I had worked out with the Bauers. Our firm took the case on a contigent basis. We will receive twenty five percent (25%) of any out of court settlement and one-third of any judgment. I hope this will be acceptable to you as well.

Enclosed is a copy of the Complaint we filed in connection with the action. I will keep you informed as to any progress.

Do not hesitate to contact me if you have any questions.

Very truly yours,

/s/ Michael A. Meyer
Attorney at Law

MAM: cs
enclosure

Exhibit B to Reply Memorandum

Cosner & Waldschmidt
Attorneys at Law
20th Floor, First American Center
Box 64
Nashville, Tennessee 37208-0064
(615)259-2179

November 25, 1985

Mr. Michael A. Meyer
Burn & Meyer
Suite 202
172 Second Avenue, North
Nashville, TN 37201

RE: Charles W. Bauer
Case No. 385-00421

Dear Mr. Meyer:

Although I do not object to your continuation of the lawsuit against Commerce Union Bank in Clarksville, I must advise you that any attorney's fees awarded in relation to that bankruptcy proceeding must be approved by the bankruptcy court, and the appointment of counsel *nunc pro tunc* is not an easy process. Furthermore, contingent fee arrangements, while occasionally authorized, are not common in fee awards in the bankruptcy court.

Therefore, you may proceed at your own risk.

Very truly yours,

/s/ Robert H. Waldschmidt

RHW:dh

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 3-85-1241

Charles W. Bauer, Jr. and
Nellie P. Bauer
vs.
Commerce Union Bank, Clarksville, Tennessee;
and Kenneth C. Baines

MEMORANDUM

(Entered: April 15, 1986)

Pending before the Court are defendants' motion to dismiss the action, cross motions for costs and attorneys' fees, and defendants' request for oral argument. After reviewing the memoranda submitted by plaintiffs and defendants to the Court pertaining to the motion to dismiss, the Court finds that oral argument on the motion will not result in clarification of the issues. Accordingly, defendants' motion for oral argument is DENIED. For the reasons discussed herein, the Court DENIES defendants' motions for costs and attorneys' fees.

Plaintiffs have based this suit on the tort theory of outrageous conduct, alleging that defendants wrongfully initiated foreclosure proceedings on a note held by Commerce Union Bank ("Bank") on a second mortgage on plaintiffs' home. Plaintiffs seek to set aside the foreclosure and to have the residence returned to them free and clear of any liens or encumbrances.

As set forth in the complaint, plaintiffs have been in default on the note, but by November 9, 1984, all back payments and penalties had been tendered by plaintiffs and accepted by defendant Bank. Plaintiffs allege that defendant Baines, Assistant Vice President of defendant Bank, then directed that the accep-

tance be revoked and that the note be accelerated. The acceleration resulted in a foreclosure. Plaintiffs allege that the foreclosure was the result of vindictive efforts by Baines, stemming from a dispute between plaintiffs and Baines regarding a defaulted note on a car. To support their allegation of malicious intent, plaintiffs rely on an alleged statement made by Mr. Baines several months prior to the foreclosure proceedings to the effect that he would "get their home." Plaintiffs thus allege that defendants' conduct was outrageous because defendants knew that they had no right to accelerate the note and that acceleration would occasion severe emotional distress to plaintiffs.

Defendants have moved to dismiss the action prusuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the conduct alleged in the complaint is not sufficient to rise to the level of "outrageous" conduct. Defendants acknowledge that if conduct of a defendant prior to and/or during a foreclosure goes beyond the pale of decency and consequently results in mental anguish to a plaintiff, a tort claim for outrageous conduct may lie. However, defendants state that, in the present case, the only allegation of conduct that possibly could be deemed outrageous is their pursuit of the foreclosure knowing that they (defendants) had no right to accelerate the payments on the house note. However, defendants argue that in a tort action for outrageous conduct, the court examines the defendants' *conduct* relating to the foreclosure, *not* the legality of the foreclosure.

Defendants thus characterize the plaintiffs' allegations as stemming directly from the alleged intent of defendants prior to the foreclosure rather than arising out of any outrageous conduct prior to or during the foreclosure. Defendants argue that allegations of "mere wrongful foreclosure without such other atrocious and intolerable conduct" cannot support liability under a claim of outrageous conduct. Defendants' Response to Plaintiffs' Reply Memorandum Opposing Defendants' Motion

to Dismiss, at 5-8. (Citing Restatement (Second) of Torts § 46 Comment d.) Defendants conclude that this action should be pared down to an action to set aside the foreclosure proceedings.

In response, plaintiffs have argued that defendants' position is unduly narrow in that it implies that a creditor can never be guilty of outrageous conduct, for an action such as a foreclosure, regardless of its motive and the consequences of the action, as long as the action was carried out properly. Rather, plaintiffs assert that the act of instituting the foreclosure with knowledge of its illegality and its consequences may itself be found to be outrageous conduct, even though the foreclosure proceedings themselves were reasonable.

In support of their position, plaintiffs cite *Foster v. Trentham's Inc.*, 458 F. Supp. 1382 (E.D. Tenn. 1978), in which the defendant had the plaintiff arrested with the knowledge that such arrest was unlawful. Even though the actual arrest was carried out properly, the court denied the motion to dismiss. Plaintiffs argue that the *Trentham* case is instructive on the present issues because it indicates the flaw in defendants' argument that an action such as a foreclosure or arrest, even if not justified, cannot serve as the basis for a tort claim of outrageous conduct if the actual procedures are reasonable or "done by the book." Based on the rationale of *Trentham,* the Court is persuaded that the complaint is sufficient to survive a motion to dismiss for failure to state a claim.

In addition to their motion to dismiss for failure to state a claim, defendants have raised additional grounds to justify dismissal of other portions of this action. First, defendants seek the dismissal of defendant Biggs, an assistant cashier to comply with Fed. R. Civ. P. 8, which requires that the complaint contain a direct, simple, and concise statement that demonstrates that the pleader is entitled to relief. Plaintiffs joined Biggs as a co-conspirator, alleging that he knowingly acted in concert with

defendants Baines and the Bank. Defendants allege that plaintiffs have failed to comply with Rule 8 by their failure to make more than a conclusory allegation that a conspiracy exists.

Several court have held that in pleading conspiracy, the pleader must include more detail than is necessary in other pleadings. However, the courts have also recognized that the nature of conspiracies may make it impossible to provide details at the pleading stage and that the pleader therefore should not be subjected to dismissal of the complaint under these circumstances. Nevertheless, the complaint must provide sufficient information for the court to determine whether a claim for relief has been stated and to enable the opposing party to prepare an adequate responsive pleading. 5 Wright & Miller, *Federal Practice and Procedure* § 1233 (1969). Considering the complaint as a whole and defendant Bank's answers to plaintiffs' interrogatories, the Court holds that defendant Biggs has been provided with sufficient information from which he may prepare a responsive pleading. Thus, the Court holds that Rule 8 has not been violated.

In addition, defendants seek to strike from the complaint plaintiffs' request for the Court to set aside the foreclosure and to have the residence returned free of liens or encumbrances. Defendants argue that in order to seek equitable relief, plaintiffs must first do equity by tendering or paying the amount lawfully owed. In response, plaintiffs assert that they did tender the amount actually due to defendant Bank in November 1984 and that such tender was accepted. Based on their allegations that on November 9, plaintiffs were current on their payments, the Court finds that plaintiffs request for such equitable should not be stricken from the complaint.

Lastly, defendants request that the Court take judicial notice of the bankruptcy proceedings involving the plaintiffs. The schedules contained in the Bauers' bankruptcy petition reveal no contingent claim for the real property that plaintiffs seek in their amended complaint. *See In re Charles W. Bauer, Jr. and*

wife, Nellie P. Bauer, No. 3-85-00421 (Bankr. M.D. Tenn. filed Feb. 15, 1985) (copy of petition attached as Exhibit A). Defendants argue that even assuming that a colorable claim involving the property exists, that interest is vested in the bankruptcy trustee and plaintiffs have no claim to the property.

In response, plaintiffs refer to a letter from plaintiffs' counsel to the bankruptcy trustee informing the trustee of the present action and stating that counsel will account to the trustee for any proceeds owing to the bankruptcy estate. Because it appears that plaintiffs can make a satisfactory accounting of any proceeds gained from this cause, the Court refuses to dismiss plaintiffs' amended complaint on the ground that the property interest involved is vested in the bankruptcy trustee.

Finally, both plaintiffs and defendants have moved pursuant to Rule 11, Fed. R. Civ. P. for this Court to tax all costs and attorneys' fees against their opponents. Rule 11 gives the Court authority to impose appropriate sanctions against parties when pleadings or motions have been interposed for any improper purpose such as harassment or delay. In that the Court is not persuaded that either party has been motivated by such improper purposes, the cross-motions for attorneys' fees and costs are both DENIED.

An Order will be entered contemporaneously with this Memorandum.

This the 9th day of April, 1986

/s/ (illegible)
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 3-85-1241

Charles W. Bauer, Jr. and
Nellie P. Bauer
vs.
Commerce Union Bank, Clarksville, Tennessee;
and Kenneth C. Baines

ORDER

(Entered: April 15, 1986)

For the reasons discussed in the contemporaneously entered Memorandum, the Court hereby DENIES defendants' motion to dismiss, DENIES both plaintiffs' and defendants' motions for costs and attorneys' fees, and DENIES defendants' motion for oral argument.

Entered this the 15th day of April, 1986.

/s/ (illegible)
United States District Judge

APPENDIX M

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE

Case No. 385-00421
Chapter 13 Proceedings
Judge George C. Paine, II

In re:

Charles W. Bauer, a/k/a Charles W. Bauer, Jr.;
and Nellie P. Bauer, a/k/a Nellie Patrick Bauer,
Debtors.

RENEWED AND AMENDED OBJECTION TO PROPOSED COMPROMISE AND SETTLEMENT

Come now Charles W. and Nellie P. Bauer, Debtors in these Chapter 13 proceedings, and renew and amend their Objection to the Chapter 7 Trustee's proposed compromise and settlement of litigation pending in the United States District Court for the Middle District of Tennessee, styled *Bauer v. Commerce Union Bank of Clarksville, Tennessee, et al.*, Docket No. 385-1241. As grounds therefor, Debtors would respectfully show to the Court as follows:

1. Effective December 3, 1986, this bankruptcy case was converted from a case under Title 11, Chapter 7, United States Code. A condition was imposed upon such conversion, and if a Chapter 13 Plan were not confirmed by February 3, 1987, the case would be reconverted to a Chapter 7. Debtors' Chapter 13 Plan was not confirmed by February 3, 1987. However, because of substantial delays in the process of converting the case to Chapter 13, which delays were not the fault of the Debtors and, in fact, were despite the efforts of the Debtors to expedite such process, the Court's ruling upon confirmation of their Plan did not take place until February 3, 1987. If such

delays had not occurred, such ruling could easily have taken place well before that date. Therefore, on February 3, 1987, Debtors filed a motion for a reasonable extension of the February 3 deadline for confirmation, and submitted modifications to their proposed Chapter 13 Plan which squarely and specifically met the grounds upon which the Court denied confirmation of their Plan and the grounds upon which Commerce Union Bank of Clarksville objected to such confirmation. In the event that reconversion to Chapter 7 is nevertheless deemed to have taken place, or if reconversion should take place in the future, Debtors respectfully submit this Renewed and Amended Objection to the Proposed Compromise and Settlement, between the Chapter 7 Trustee and Commerce Union Bank of Clarksville, of the above-referenced District Court.

2. Debtors raise all of the grounds set forth in their previous objection to such proposed compromise and settlement, and incorporate them herein by reference. These grounds include the following:

A. The law is clear that several important factors must be considered in approving or disapproving a proposed compromise and settlement. Among these are the likelihood that the Debtors will prevail in the litigation; any impediments to collection; the complexity, expense and delay of the litigation; and the interests of creditors. It is clear that the Trustee did not carry out his duties in investigating and considering the propriety of the compromise and settlement. The factors which the Trustee failed to investigate mandate disapproval of the compromise and settlement.

B. The value of the lawsuit in question far exceeds the amount necessary to pay all of Debtors' creditors, and all administrative expenses, in full. Therefore, Debtors claim substantial equity in such lawsuit. Debtors are parties in interest in this bankruptcy case, and have the right under 11 U.S.C. §726 to any funds over and above the amount necessary to pay

their creditors, and administrative expenses, in full. The Trustee has no right to compromise and settle this lawsuit for an amount so palpably inadequate, and to act in complete derogation of Debtors' rights.

3. Debtors object to the proposed compromise and settlement because it is inadequate to yield a reasonable dividend to creditors after appropriate deductions have been made:

A. Under the Bankruptcy Code, the expenses of administering the case in Chapter 13 must be allowed. Such administrative expenses include the administrative fees, if any, of the Chapter 13 Trustee; and the allowed claims of Debtors' counsel for legal services and reimbursement of out-of-pocket expenses. Such fees will far exceed the intitial $750.00 fee routinely allowed to Debtors' attorneys in Chapter 13 cases; and, in fact, are expected to amount to most, if not all, of the settlement amount of $7,500.00.

B. Debtors' litigation counsel, Burn & Meyer, performed over 400 hours of legal services, and incurred approximately $2,600.00 in out-of-pocket expenses, in pursuing and preparing for trial the litigation which the Trustee has proposed to compromise and settle. Burn & Meyer proceeded to pursue such litigation with the knowledge and approval of the Trustee, and on his behalf. After Burn & Meyer had completed preparation of such lawsuit for trial, and Debtors had moved to reopen this bankruptcy case, the Trustee filed a pleading joining in such motion, and prayed that the Court approve the employment of Burn & Meyer to represent the estate in such litigation. That prayer was never ruled upon by the Court. Debtors respectfully assert that any recovery, including a recovery through the proposed compromise and settlement, is entirely by virtue of the efforts and skill of Burn & Meyer. Debtors therefore assert that, in the interest of fairness and equity, the employment of Burn & Meyer should be approved, *nunc pro tunc;* or, alternatively, that Burn & Meyer should be allowed compensation on a quan-

tum meruit basis. Under any circumstances, Burn & Meyer should be allowed to recover the out-of-pocket expenses which they incurred. The legal services were performed and expenses were incurred, at all times, with the understanding that counsel were representing the estate. Their efforts were for the purpose of preserving and realizing upon property of the estate. Therefore, such compensation should have administrative expense priority under 11 U.S.C. §503. However, if such compensation is not granted administrative expense priority, it should be allowed as a general claim, as if it had been incurred immediately before the filing of the petition. In either case, allowance of fair compensation to Burn & Meyer would substantially reduce the amount of the dividend payable to creditors out of the $7,500.00 which would be paid in the compromise and settlement.

C. Based upon the foregoing, it is clear that, if the proposed compromise and settlement were approved, necessary deductions from the settlement proceeds of $7,500.00 will greatly reduce, if not completely consume, such $7,500.00. The result would be that the actual dividend to creditors would be negligible and de minimis, rather than the substantial dividend which the Trustee has represented to this Court would be distributable.

4. Debtors object to approval of the proposed compromise and settlement on grounds that this Court lacks the authority to effect a final and binding disposition of the litigation which is presently pending before the United States District Court for the Middle District of Tennessee. Such litigation involves a claim based upon the tort of outrageous conduct, which is a personal injury tort arising under the common law of the State of Tennessee. The District Court has independent jurisdiction over this lawsuit, based upon diversity of citizenship and pursuant to 28 U.S.C. §1332. Therefore, under 28 U.S.C. §157(b)(5), and based upon the principles which are set forth in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,

458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), disposition of the lawsuit pending in District Court involves an exercise of judicial power which can only be effected by Federal Courts which have been created under Article III of the United States Constitution, or an equivalent state court. This Court does not have subject matter jurisdiction over such lawsuit. This Court cannot enter any order or judgment which would have the effect of adjudicating the rights and claims which are pending in the District Court. The issues involved in such litigation can only be litigated, or compromised and settled, in the first instance, in the District Court. Further, the Trustee cannot compromise and settle an action to which he has not become a party and in which he has not intervened. Further, this Court cannot enter an order or judgment which would foreclose the Debtors' constitutional right to a trial by jury.

5. This Court should abstain, under 28 U.S.C. §1334(c)(1), from entering an order or judgment which would have the effect of adjudicating substantive rights which are at issue in pending litigation in a separate court, in which proper procedures have not been followed to make the Trustee a party thereto, and in which appropriate avenues exist under the Rules of Procedure which govern such litigation in the court in which it is pending. It would be improper for compromise and settlement procedures to be followed in this Court unless and until proper procedures for compromising and settling the litigation are followed, by persons and entities which are proper parties to such litigation, in the court in which such litigation is actually pending.

WHEREFORE, Debtors respectfully pray that this Court abstain from further consideration of the proposed compromise and settlement, and from taking any other steps which would affect the rights, claims and causes of action at issue before the United States District Court for the Middle District of Tennessee, unless and until such litigation is compromised and settled among persons and entities which are properly parties to such

litigation, in such court; or, alternatively, that the Court deny approval of the Trustee's proposed compromise and settlement and uphold the Debtors' objection thereto; and that the Debtors have such other, further and general relief as is just.

/s/ Linda W. Knight
GULLETT, SANFORD,
ROBINSON & MARTIN
Counsel for Debtors
P. O. Box 2757
Nashville, TN 37219-0757
(615) 244-4994

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document has been served on Burn & Meyer, at 172 Second Avenue, North, Suite 202, Nashville, TN 37201, and Craig J. Donaldson, Dearborn & Ewing, Suite 1200, one Commerce Place, Nashville, TN 37239, by HAND-DELIVERY, and on Henry Hildbrand III, Chapter 13 Trustee, P. O. Box 2601, Nashville, TN 37219, and Robert H. Waldschmidt, Cosner & Waldschmidt, 20th Floor, First American Center, Nashville, TN 37238, by depositing same in a sealed wrapper, postage prepaid, in the United States mail at Nashville, Tennessee, this 13 day of February 1987.

/s/ Linda W. Knight

:dj
baur&aob.lwk

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-85-1241
Judge Nixon

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs,

v.

Commerce Union Bank, Clarksville, Tennessee, et.al.,
Defendants.

PLAINTIFFS' MOTION TO AMEND ORDER

Plaintiffs, through counsel and pursuant to F.R.C.P. Rule 59, move for an amendment to the Order entered by this Honorable Court in the above styled cause on April 1, 1987. For purposes of this motion such Order shall hereinafter be referred to as the "April 1 Order". In support thereof, plaintiffs state as follows:

1. In the April 1 Order, this Honorable Court granted plaintiffs' motion to dissolve the stay and directed the trustee to elect one of the three actions described therein within thirty (30) days. The Court qualified such Order by stating that the trustee and Bankruptcy Court were free to proceed as if the cause of action had been listed as an asset in the prior bankruptcy proceedings. The Court further qualified the April 1 Order as authorizing the trustee and Bankruptcy Court to "take whatever action *pursuant to law* that they deem appropriate to fully conclude plaintiffs' bankruptcy proceeding." (April 1 Order, p.2, emphasis added).

2. The April 1 Order does not expressly dispose of plaintiffs' motion to withdraw the order of reference. Plaintiffs respect-

fully submit that the absence of such a disposition has left a material issue unresolved, namely, whether this Honorable Court intended to retain exclusive authority over the liquidation of the case at bar while giving the trustee and Bankruptcy Court the widest permissible latitude over the administration of plaintiffs' bankruptcy estate. Or, alternatively, whether this Honorable Court intended to authorize the trustee and Bankruptcy Court to settle this action without plaintiffs' consent even though such action or similar action would effectively deprive plaintiffs of a meaningful hearing on the merits before this Honorable Court.

3. Plaintiffs respectfully submit that existing legal principles require this Honorable Court to assume exclusive control over all aspects of the liquidation of this case. In *Northern Pipeline Construction Co. vs. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) the Supreme Court held that Article II courts have the exclusive authority to render final and binding judgments in cases requiring the exercise of judicial power. In such cases, according to the Court, Congress could not confer subject matter jurisdiction upon the Bankruptcy Courts because doing so would upset the separation of powers as mandated by the Constitution. Of equal significance, such action on the part of Congress would effectively deprive litigants of their right to the protections associated with having these causes heard in an Article III forum. Among the actions which the Court described as requiring an exercise of the judicial power are causes which arise under the common law. *In re White Motor Credit*, 764 F.2d 270 (6th Cir. 1985) provides a further explanation of *Northern Pipeline*. In that case the Court stated that the exercise of judicial power meant the assumption of control over all aspects of the liquidation of a cause of action. While the Court discussed these implications in terms of references of cases which had been referred to state courts, it is clear that they also apply to actions which are pending in District Courts. Such a view is further supported by the Congressional response to *Northern Pipeline*. As described in

White Motor Credit, the legislative response is set forth in three provisions, 28 U.S.C. §§157, 1334 and 1411. Of these, section 1334 is of minor significance here because this Court would have jurisdiction over this action even in the absence of plaintiffs' bankruptcy. With respect to the other two, 28 U.S.C. §157(b)(5) provides that personal injury actions shall be tried in the District Court and 28 U.S.C. §1411 expressly states that nothing in the Bankruptcy Code shall affect a party's right to a trial by jury for personal injury actions which would exist independently of the bankruptcy. Further, the statutory provisions and especially 28 U.S.C. §1411 provide that the right to a trial by jury does not depend upon whether the action is brought by or against the debtor or estate. That right is expressly preserved regardless of whether the injured party is the debtor or some stranger to the bankruptcy proceedings. This shows that Congress intended for parties to personal injury actions to have the same rights as they would otherwise have if the bankruptcy proceedings did not exist.

4. The record reflects that the case at bar falls squarely within the principles described in the preceding paragraph. As defendants have conceded, this is a common law personal injury tort in which plaintiffs have a substantial stake in the outcome. Furthermore, this action is independent of and would exist in the absence of the bankruptcy. Its only relationship with the bankruptcy lies in the fact that the estate shares an interest in the outcome. Also, as the record further reflects, the wrongful conduct which gives rise to this action also precipitated the bankruptcy. If the bankruptcy did not exist, plaintiffs would have the right to a jury trial in District Court, and such a right is not to be affected by the bankruptcy.

5. As the authorities described in paragraph 3 state, the Bankruptcy Court lacks the authority to render a final and binding judgment on the merits of this cause. It clearly has no subject matter jurisdiction in personal injury cases. Furthermore, this case is not pending in the Bankruptcy Court and that court

cannot settle a lawsuit which is not pending in that court. The trustee, after becoming a party to this action, cannot simply obtain Bankruptcy Court approval for a compromise and settlement over plaintiffs' objection and then come into this Honorable Court and enter an Order of Dismissal which would preclude plaintiffs from proceeding to a jury trial in this cause. The effect would be to allow the trustee and defendants to indirectly achieve an objective which would be unavailable through direct means. By doing so they would be able to circumvent the rights which plaintiffs have been guaranteed under the Constitution and Congressional enactment, including the right to a trial by jury. At the same time, defendants, with the assistance of the trustee, would escape having to account to the community for their wrongful conduct. As the authorities set forth in paragraph 3 show, proper procedure requires that all aspects of plaintiffs' lawsuit, including settlement, be governed by the forms, customs and procedures which are generally followed by this Honorable Court. In sum, this means that a settlement of this case can only be effected by first obtaining the consent of all parties in interest, including plaintiffs. Once this has been done, the trustee can then apply to the Bankruptcy Court for any settlement authority which he would need to effect any such settlement on behalf of the estate.

6. Amending the April 1 Order to expressly prohibit the trustee and Bankruptcy Court from attempting to settle or otherwise dispose of this case without plaintiffs' consent would be consistent with the spirit of the April 1 Order. Further, it would maintain the balance of authority which is contemplated by the statutes and caselaw set forth in paragraph 3. This Court has already limited the actions of the trustee and Bankruptcy Court to those which are "pursuant to law". In the absence of an express prohibition, the April 1 Order could be construed as allowing the trustee and Bankruptcy Court to effect a direct or indirect disposition of this action. Although such a step would be unlawful, any attempt to undo the damage would have further adverse effects on the record and, of greater significance,

would lead to further delays in getting this case to trial on the merits. On the other hand, clarification as described herein would not prevent the trustee or Bankruptcy Court from acting upon matters which are normally involved in the administration of bankruptcy estates or are otherwise within their proper spheres of action. For example, nothing in the amendment of the April 1 Order would prohibit the Bankruptcy Court from deciding whether plaintiffs' bankruptcy should proceed as a Chapter 7 or Chapter 13. It would not prohibit the trustee or Bankruptcy Court from handling the distribution of any assets, including any proceeds from this lawsuit or from exercising their lawful authority with respect to any other matter which would not affect the substantive and procedural issues arising in the case at bar. The Amendment would simply prevent the trustee and defendants from attempting to circumvent the plaintiffs' right to the meaningful hearing in this Honorable Court, including the right to a trial by jury.

IN VIEW OF THE FOREGOING, plaintiffs respectfully move this Honorable Court to amend the April 1 Order to expressly prohibit the trustee or Bankruptcy Court from attempting to settle the case at bar or to take any other action which would interfere with plaintiffs' ability to fully and fairly exercise their rights to a hearing on the merits of this cause before this Honorable Court, including, but not limited to, their right to a trial by jury.

A PROPOSED ORDER IS TENDERED CONTEMPORANEOUSLY HEREWITH.

Respectfully submitted,

Burn & Meyer
172 Second Avenue North
Suite 202
Nashville, Tennessee 37201
(615) 256-5568

Plaintiffs' Attorneys

By: /s/ David N. Burn

By: /s/ Michael A. Meyer

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon the defendants by hand delivery of a copy of the same to Linda W. Knight, Esq., Gullett, Sanford, Robinson & Martin, Metropolitan Federal Building, 3rd Floor, Nashville, Tennessee; Craig J. Donaldson, Esquire, Dearborn & Ewing, Suite 1200, One Commerce Place, Nashville, Tennessee; and to Robert H. Waldschmidt, Chapter 7 Trustee, Cosner & Waldschmidt, 20th Floor, First American Center, Nashville, Tennessee 37238, and by mailing a copy of the same to Henry E. Hildebrand, Chapter 13 Trustee, PO Box 2601, Nashville, Tennessee, this 7th day of April, 1987.

/s/ Michael A. Meyer

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3-85-1241
Judge Nixon

Charles W. Bauer, Jr., and Nellie P. Bauer,
Plaintiffs,

v.

Commerce Union Bank, Clarksville, Tennessee, et al.,
Defendants.

COMMERCE UNION BANK'S MOTION TO CLARIFY ORDER

(Filed April 17, 1987)

Comes now the defendant, Commerce Union Bank Clarksville ("CUB-C"), and moves this Court to clarify its Order of April 1, 1987, to provide that Robert H. Waldschmidt, the Chapter 7 Trustee, shall assume prosecution of the above-styled civil action by substituting himself as Plaintiff, and that he shall then take all action necessary to either prosecute the lawsuit or to settle it. Further, CUB-C requests that the April 1, 1987, Order be clarified to state that if the Trustee elects to settle the suit, the Trustee shall proceed in Bankruptcy Court as provided by applicable law.

In support of this Motion to Clarify the April 1 Order, CUB-C relies on the language of the order which provides as follows:

> "In instructing the Trustee to make an election, the Court seeks only to clarify the status of a case pending before it. It does not seek to limit the Bankruptcy Court or the Trustee's authority to act as it would have if the lawsuit now pending had been listed as an asset of the estate in the prior bankruptcy proceeding. The Court's June 26 order

should not be read as limiting the authority of the Bankruptcy Court or the Trustee to take whatever action pursuant to law that they deem approprite to fully conclude the Plaintiff's bankruptcy proceeding."

Order entered April 1, 1987, at page 2. By the above language, the Court clearly intended to allow the Trustee to substitute himself as a party Plaintiff in this civil action, and to take such other steps as are necessary and proper to represent the interest of the bankruptcy estate in this case. This section of the order may conflict with the first paragraph on page 2, which narrowly read would require the Trustee to either abandon the claim of the Plaintiffs, authorize the Plaintiffs to proceed on behalf of the creditors, or order the Trustee to be joined as a party to the action. *Id.* However, it appears that it is clearly the intent of the District Court to allow the Trustee and the Bankruptcy Court broad latitude to dispose of this case in whatever manner is provided by law.

WHEREFORE, the above premises considered, CUB-C requests this Court to consider this Motion, and to enter an Order clarifying its April 1, 1987, Order in the manner set out above.

Respectfully submitted,

DEARBORN & EWING

/s/ CJD by Gregory D. Smith
Craig J. Donaldson

/s/ LWC by Gregory D. Smith
L. Webb Campbell, II
Attorneys for Commerce Union
Bank, Clarksville, Tennessee
Suite 1200
One Commerce Place
Nashville, TN 37239
615/259-3560

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Motion was mailed first class, postage prepaid to: Ms. Linda W. Knight of Gullett, Sanford, Robinson & Martin, Attorneys for Debtors, P.O. Box 2757, Nashville, TN 37219-0757; Mr. Michael Meyer of Burn & Meyer, Attorneys for Debtors, 172 - 2nd Avenue North, Nashville, TN 37201; Mr. Robert W. Waldschmidt, 20th Floor, First American Center, Nashville, TN 37238; and Mr. Henry E. Hildebrand, III, Chapter 7 Trustee, P. O. Box 2601, Nashville, TN 37219, this 17th day of April, 1987.

/s/ Gregory D. Smith

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Charles W. Bauer, Et Ux.

v.

Commerce Union Bank,
Clarksville, Tennessee, et al.

Docket No. 3-85-1241

ORDER

Pending before the Court are motions to clarify and amend the Court's Order of March 30, 1987 by plaintiffs and defendant. These motions are hereby DENIED, except that the trustee shall make his election within fifteen (15) days of entry of this Order.

Entered this the 27th day of April, 1987.

/s/ illegible
United States District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:85-1241

IN RE:

Charles W. Bauer, Jr. and Nellie P. Bauer,
Plaintiffs

v.

Commerce Union Bank,
Clarksville, Tennessee, et al.,
Defendants

MOTION TO INTERVENE

Comes now the trustee in bankruptcy for charles W. Bauer, Jr. and Nellie P. Bauer (Case No. 385-00421, M.D. Tenn.), and moves that the court permit him to intervene in this adversary proceeding, and to be substituted as the plaintiff.

The trustee would further state that this action is in accordance with the provisions of the court's order on March 30, 1987, and constitutes an election by the trustee to be joined as a party to this action and to resolve this proceeding, as the plaintiff, in any manner which is authorized by the Bankruptcy Code and Rules.

WHEREFORE, THE TRUSTEE PRAYS for the entry of an order substituting him as the plaintiff in this proceeding, and for such other and further general relief as is just.

RESPECTFULLY SUBMITTED,

/s/ Robert H. Waldschmidt
Attorney for Trustee
20th Floor, 1st American Center
Nashville, TN 37238

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent to Linda W. Knight, Gullet, Sanford, Robinson & Martin, P.O. 2757, Nashville, TN 37219-0757; Michael Meyer, Burn & Meyer, 172 Second Avenue, North, Nashville, TN 37239; and to Henry E. Hildebrand, III, P.O. 2601, Nashville, TN 37219, by U.S. Mail, postage prepaid, this the 28th day of April, 1987.

/s/ Robert H. Waldschmidt

APPENDIX Q

* * * * *

[142] Bankruptcy Court approval. There was a hearing on that, Your Honor, as Mr. Meyer pointed out in his argument. There was also a hearing on this motion to convert to Chapter 13, which is clearly well and beyond anything contemplated in this Court's June 26, 1986 order.

Now we come to the question of party and interest that Mr. Meyer has alluded to, Your Honor. In the present posture of the case, Mr. Waldschmidt holds the asset, he is doing what he is supposed to do as trustee, and that is administer the assets. In his informed judgment as an experienced bankruptcy attorney and trustee, he determined that the best interest of the estate to which this cause of action belongs is to settle it. Now, the plaintiffs, as debtors in the bankruptcy case and under the Protective Investors Committee case cited by Mr. Meyer, he says they are a party in interest. And sure, they are. And they have an opportunity to be heard. That's true, too. But their opportunity to be heard, if the Court please, is on an objection to the settlement, just like the other creditor wanted to object to that settlement, that is their sole and only opportunity to be heard under the structure **[143]** of the bankruptcy code. They objected. They have been heard. They have been heard more than once by Judge Paine during the course of this proceeding since it went from this Court to the bankruptcy court. And at this point the Bankruptcy Court action, since the Chapter 13 confirmation has been denied, and I might add, Your Honor, that order was entered on February 19th, and to our knowledge, no notice of appeal has been filed, that order is filed.

Now, I will point out to the Court, plaintiffs or the debtors in the bankruptcy case have filed a motion to set aside, and it's not the subject of today's discussion, but I submit to Your Honor that that's not a sufficient order to sustain the time for running of appeal. In any event, Your Honor, they had their opportuni-

ty to be heard, and that's the only objection. The bankruptcy court still hasn't ruled. So we don't know whether the bankruptcy court is going to approve the compromise or disapprove it or what's going to happen. The point is, however, Your Honor, that the Bankruptcy Court and the trustee have faithfully followed the dictatés of the Sharmer case to date. If anything, Your Honor, **[144]** the Bankruptcy Judge went above and beyond giving the plaintiffs the opportunity to try to convert to Chapter 13, which, as I said, he denied.

Now, the plaintiffs' counsel would tell the Court that leaving this case in the bankruptcy court is going to be an additional avenue of delay or cause further delays. I suggest to Your Honor exactly the opposite is true if the case is left in the Bankruptcy Court. The only thing that remains to be done in the Bankruptcy Court at this point, Your Honor, as we understand it, is for Judge Paine to issue a ruling, since he has already heard the evidence back in November of 1986, to pass on the compromise and settlement. Assuming that Judge Paine approved the compromise and settlement.

Of course, the plaintiffs or anybody else that was dissatisfied would have a direct avenue of appeal to this court to review whether or not he abused his discretion in approving the compromise and settlement. Assuming further, Your Honor, that he approved it and the district court affirmed, the action would be settled, it would be over, and the only thing that would remain to be done in this Court would be to tender an order of **[145]** dismissal. I suggest to the Court that that is nothing of any matter of delay. The delay is occasioned by every time the plaintiffs were dissatisfied with something that happens in the Bankruptcy Court, then they want to come back to the District court, as evidenced by this motion today.

Now, addressing the constitutional argument, Your Honor, or the apparent, I would say is the proper term of constitutional argument. As pointed out in our memorandum, Your Honor,

28 U.S.C. Section 157 was part of the bankruptcy amendments in the Federal Judgship Act of 1984, most definately passed by Congress in response to the Supreme Court's decision in the Northern Pipeline Marathon case concerning Article III jurisdiction. However, we seriously disagree, Your Honor, with plaintiff's interpretation of that statute. As pointed out in our memorandum, Your Honor, a reading of the complete section, 28 U.S.C. Section 157 in its entirety without isolating on Subsection (b)(5), would indicate that the personal injury tort or wrongful death claims mentioned in that section are those possessed by a third party against a bankruptcy

88-1209

No.

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT as Trustee of the Bankruptcy Estate of Charles W. and Nellie P. Bauer, SOVRAN BANK/CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

CRAIG J. DONALDSON
GREGORY D. SMITH
L. WEBB CAMPBELL, II
DEARBORN & EWING
Suite 1200, One Commerce Place
Nashville, TN 37239
(615) 259-3560

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

1. Whether this Court should grant certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit which affirmed a District Court order substituting the Petitioners' Chapter 7 Trustee as party-plaintiff in an action brought by the Petitioners against Sovran Bank/Central South and two of its employees.

TABLE OF CONTENTS

	Page
Question Presented	1
Table of Authorities	iv
Index to Appendix	vi
Opinions Below	1
Jurisdiction	2
I. Statement of the Case	2
II. Summary of Argument Against Granting the Writ of Certiorari	4
III. Argument	6
IV. Conclusion	12

TABLE OF AUTHORITIES

	Page
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), 93 L.Ed 1528, 69 S.Ct. 1221 (1949)	6
R.J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 281 (10th Cir. 1977)	3
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 66 L.Ed 2d 571, 101 S.Ct. 669 (1981)	6
Jefferson v. Mississippi Gulf Coast YMCA, 73 Bankr. 179, 181-82 (S.D. Miss. 1986)	11
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 392-393, 43 S.Ct. 422, 423-424, 67 L.Ed. 712 (1923)	9
Liddell v. Board of Education of City of St. Louis, 693 F.2d 721, 723, n.6 (8th Cir. 1981)	7
Metalock Repair Service v. Harman, 216 F.2d 611, 611-612 (6th Cir. 1954)	7
Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1325 (10th Cir. 1978)	7
Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 705, 709 (9th Cir. 1986).....	11
Tignor v. Parkinson, 729 F.2d 977, 981 (4th Cir. 1984) .	11
Virginia Land Co. v. Miami Shipbuilding Corp., 201 F.2d 506, 508 (5th Cir. 1953)	6
In re McCorhill Publishing, Inc., 89 B.R. 393 (Bankr. S.D. N.Y. 1988).....	8,9
In re Sylvania Electric Products, Inc., 220 F.2d 423, 424-425 (1st Cir. 1955)	7

Constitution, Statutes, Rules and Regulations:

11 U.S.C. §323(b) 11

11 U.S.C. §541(a) 11

28 U.S.C. §1254 2,4,6

Bankruptcy Rule 6009 11

Federal Rules of Civil Procedure 25 3,10

Federal Rules of Civil Procedure 25(c) 3

Supreme Court Rule 17 5,8,9,10

Other Authorities:

4 Collier on Bankruptcy, ¶704.02 (15th Ed. 1982) 11

Federal Practice and Procedure, 7C C. Wright, A. Miller & M. Kane, §1962 (2d Ed. 1986) 3,4

INDEX TO APPENDIX

Sovran incorporates by reference the Appendix set forth in the Petition for Writ of Certiorari. References to materials within Petitioners' Appendix shall be made as follows:

"Appendix _____ to Petition for Writ of Certiorari at A-_____."

In addition, Sovran includes the following document as Appendix 1 to its Brief:

Order of the United States Bankruptcy Court for the Middle District of Tennessee entered May 29, 1987 ..... A-1

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT as Trustee of the Bankruptcy Estate of Charles W. and Nellie P. Bauer, SOVRAN BANK/CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Sovran incorporates by reference the statement of the Petitioners in their Petition for a Writ of Certiorari regarding the opinions of the District Court and the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

Sovran incorporates by reference the statement of the Petitioners in their Petition for a Writ of Certiorari regarding the timely filing of their petition, but asserts that this Court does not have the jurisdiction to consider the petition because the case is not "in the court of appeals" as required by 28 U.S.C. §1254.

I. STATEMENT OF THE CASE

Respondent Sovran Bank/Central South ("Sovran") accepts the Statement of the Case presented by the Petitioners with the following exceptions and clarifications:

1. The Petitioners set forth as fact certain allegations in their Statement of the Case which are not supported by the record. The Petitioners state that, "the former Trustee [Mr. Robert H. Waldschmidt] authorized the Petitioners to proceed on behalf of the estate and to account to him for any judgment proceeds." *See* Petition for Writ of Certiorari at 9, referencing letter dated November 25, 1985. At the time this letter was written, the Petitioners' bankruptcy case had been closed; the Petitioners had received a discharge; and Mr. Waldschmidt had been discharged as Trustee for the Petitioners' bankruptcy estate. Accordingly, Mr. Waldschmidt had no authority to authorize the Petitioners to proceed on behalf of an estate which did not exist. In fact, the letter from Mr. Waldschmidt to the attorney for the Petitioners clearly states that he could "proceed at your own risk." *See* letter from Robert H. Waldschmidt to Michael A. Meyer dated November 25, 1985, Appendix K to Petition for Writ of Certiorari, at A-41.

2. The Petitioners fail to state in their statement of the Case that the Bankruptcy Court approved the proposed settlement between the Trustee and Sovran only after a hearing at which the Petitioners appeared with counsel and presented proof as to

the alleged inadequacy of the settlement. *See* Order entered May 29, 1987 by the United States Bankruptcy Court for the Middle District of Tennessee, Appendix 1. In that order, the Bankruptcy Court found, *inter alia*, that (1) the Petitioners had failed to disclose their cause of action against Sovran to the Trustee; (2) the Petitioners had failed to list the cause of action as an asset on their bankruptcy petition; and (3) that the proposed settlement was reasonable and in the best interests of creditors and the estate. *Id.* The Petitioners appealed the Bankruptcy Court order to the District Court, which presently has the appeal under advisement.

3. This petition for a writ of certiorari involves the issue of whether the District Court erred in substituting the Petitioner's Chapter 7 bankruptcy trustee as party-plaintiff in an action brought by the Petitioners against Sovran, which action is based upon operative facts that occurred prior to the Petitioners' bankruptcy filing. The District Court ordered the substitution based upon Rule 25 of the Federal Rules of Civil Procedure, which provides in relevant part that

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

Fed. R. Civ. Proc. 25(c). The Court of Appeals held that the order of the District Court allowing the substitution of the Chapter 7 Trustee as party-plaintiff was interlocutory and nonappealable. The Court of Appeals noted that such orders are reviewed only for abuse of discretion. Order Entered by Sixth Circuit Court of Appeals on October 20, 1988, Appendix A to Petition for Writ of Certiorari at A-6, *citing R.J. Enstrom Corp. v. Interceptor Corp.*, 555 F.2d 277, 281 (10th Cir. 1977) and 7C C. Wright, A. Miller & M. Kane, *Federal Practice and*

Procedure, §1962 (2d Ed. 1986). The Court stated that "Even if the order of substitution were immediately appealable, we would be unable to detect so much as hint of any abuse of discretion here." Appendix A to Petition for Writ of Certiorari at A-6.

The Court of Appeals further held that the District Court order did not come with the purview of the collateral order doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because the decision did not involve an "important" issue. Appendix A to Petition for Writ of Certiorari at A-4. Specifically, the Court of Appeals stated that

> "We are not persuaded that the question is an 'important' one, because . . . the argument that substitution was improper appears to border on the frivolous. Questions that obviously admit of only one answer . . . are not important enough to justify consideration in separate interlocutory appeals."

Id. at A-4. The Petitioners now present the same argument to this Court.

II. SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

The issue presented is whether this Court should grant certiorari to review the decision of United States Court of Appeals for the Sixth Circuit which affirmed a District Court order substituting the Petitioners' Chapter 7 Trustee as party-plaintiff in an action brought by the Petitioners against Sovran and two of its employees.

Sovran submits that this Court does not have jurisdiction to decide this case because it was not properly in the Court of Appeals, as required by 28 U.S.C. §1254. The order complained of by Petitioners is not a final order or a reviewable collateral order and therefore the Court of Appeals properly dismissed the appeal for lack of jurisdiction.

Sovran submits further that the Petitioners fail to set forth "special and important" reasons for granting the writ of certiorari as required by Supreme Court Rule 17. The Petitioners do not assert that the decision of the Court of Appeals conflicts with decisions of other courts of appeal. Nor do the Petitioners allege misconduct by either the District Court or the Court of Appeals. Finally, the Petitioners cannot establish that the Court of Appeals decided an "important" question of federal law either not previously addressed by this Court or in conflict with a decision by this Court.

III. ARGUMENT

A. The Decision of the District Court is Not a Final Order and Therefore this Court Does Not Have Jurisdiction to Review the Decision by Certiorari.

The authority of the Supreme Court to review decisions of lower courts by certiorari is established by 28 U.S.C. §1254, which provides, in relevant part, that

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."
>
> * * *

28 U.S.C. §1254. The fundamental requirement of the statute — that cases be "in the court of appeals" — is not satisfied in this case. The Court of Appeals properly dismissed the appeal from the District Court for lack of jurisdiction because it held the decision of the District Court was neither a final order nor an appealable collateral order. The Petitioners do not argue that the order of the District Court, substituting Petitioner's Chapter 7 bankruptcy trustee as party-plaintiff in an action brought by Petitioners against Sovran and two of its employees, is a final order. Instead, the Petitioners contend that the order is a collateral order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 66 L.Ed. 2d 571, 101 S.Ct. 669 (1981).

There appears to be no conflict within the Courts of Appeal on the issue that a substitution order is interlocutory and non-appealable, and there is no authority for the proposition that such an order is a collateral order within the meaning of *Cohen*. *See, e.g., Virginia Land Co. v. Miami Shipbuilding Corp.*, 201

F.2d 506, 508 (5th Cir. 1953) (order denying substitution of parties, which rested in the discretion of the District Court, was not appealable); *Liddell v. Board of Education of City of St. Louis*, 693 F.2d 721, 723, n.6 (8th Cir. 1981) (portion of district court order which added school district as defendant in desegregation suit not appealable); *Metalock Repair Service v. Harman*, 216 F.2d 611, 611-612 (6th Cir. 1954) (order directing joinder of aditional parties defendant was interlocutory and non-appealable); *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1325 (10th Cir. 1978) (order joining second corporation as a party-defendant was interlocutory and non-appealable); *In re Sylvania Electric Products, Inc.*, 220 F.2d 423, 425 (1st Cir. 1955) (court denied petitioner's motion for leave to file petition for writ of mandamus directing district court to vacate unappealable interlocutory order allowing substitution of party-plaintiff). In *Sylvania Electric Products*, the Court stated that Congress, in following a policy against allowing "piecemeal appellate review" has in general provided for judicial review only of final decisions. 220 F.2d at 424. The Court noted that this policy was adhered to even in cases in which appellate review of an interlocutory decision might prevent a lengthy trial. *Id.* at 425.

The Petitioners assert that the substitution order has the effect of deciding the case on the merits; however, Petitioners acknowledge that they can object and be heard with regard to any settlement of the action proposed by the Trustee. Indeed, the present case is rife with the sort of "piecemeal review" of which the court in *Sylvania Electric Products* warned: the Petitioners have appealed the substitution order from the District Court to the Court of Appeals, and now attempt appeal to this Court, while at the same time challenging on appeal to the District Court the decision of the Bankruptcy Court approving the proposed compromise and settlement of the action. As the Court of Appeals specifically noted, the Petitioners can appeal the Bankruptcy Court order to the Court of Appeals if unsatisfied with the result in District Court. *See* Appendix A to Petition for Writ of Certiorari at A-5. At that time, the Court

of Appeals can decide the correctness of the final judgment and all interlocutory orders in this case. Thus, the Petitioners cannot establish an important element of the *Cohen* test: that if the present order were not appealable, then the order would effectively be beyond review.

B. The Petitioners Have Failed to Set Forth Special and Important Reasons for the Granting of a Writ of Certiorari as Required by Supreme Court Rule 17.

Rule 17 of the Supreme Court Rules sets forth several factors to be considered by the Court in determining whether to grant certiorari in a particular case. These considerations include (1) whether a federal court of appeals has rendered a decision in conflict with another federal court of appeals on the same question; (2) whether a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision; and (3) whether a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. Supreme Court Rule 17. The remaining factors outlined in Rule 17 are concerned with conflicts between state law and federal law, or state court resolutions of federal questions, and are not applicable of this case.

The Petitioners fail to state any special or important reason for granting the writ of certiorari in this case. First, the decision of the Sixth Circuit Court of Appeals does not conflict with the decision of any other federal court of appeals on the same question. Indeed, the Petitioners do not even allege such a conflict. The Petitioners assert only that the Sixth Circuit's decision conflicts with the decision of a Bankruptcy Court in the Second Circuit, *In re McCorhill Publishing, Inc.*, 89 B.R. 393 (Bankr. S.D. N.Y. 1988). Even if true, a conflict between a Court of Appeals

and a bankruptcy court does not satisfy the requirements of Rule 17. This is particularly significant in light of this Court's previous statement that

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases the settlement of which is of importance to the public as distinguished from that of the parties, *and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.*"

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 392-393, 43 S.Ct. 422, 423-424, 67 L.Ed. 712 (1923) (emphasis added).

Sovran asserts not only that Petitioners' reliance on *McCorhill,* as evidence of a split among circuits, is misplaced, but also that *McCorhill* does not conflict with the decision of the Sixth Circuit in the present case. In *McCorhill,* the Bankruptcy Court held that a Chapter 11 debtor had standing to object to a claim filed by a creditor, and to assert counterclaims against that creditor, even though a trustee had been appointed in the case. *Id.* at 396. The Court relied largely on the fact that the Trustee *supported* the Debtor's standing to pursue a counterclaim against its creditor. *Id.* In the present case, unlike *McCorhill,* the Trustee does not support participation by the Petitioners in the control of the lawsuit against Sovran. While Sovran cannot speak for the Trustee, this is apparently based on the fact that the Trustee does not care to trade a certain return to the creditors of the Petitioners' estate (based upon the settlement approved by the Bankruptcy Court) for a speculative recovery on a difficult and costly lawsuit. Thus, unlike *McCorhill,* the creditors in this case bear the risks of going forward — a risk the Trustee, acting on behalf of the creditors, was not prepared to take.

Second, the Petitioners do not assert that the Sixth Circuit departed from or sanctioned a departure from the usual course

of judicial proceedings. The District Court certainly acted within its authority in substituting the Trustee as party-plaintiff. Such substitutions are specifically contemplated by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. Proc. 25. Neither the District Court nor the Sixth Circuit have acted in such a way as to require the supervision of this Court.

Finally, the Sixth Circuit did not decide an "important" question of federal law either not previously addressed by this Court or in conflict with a decision by this Court. The Sixth Circuit decided that the decision to substitute the Trustee as party-plaintiff was not a final order and therefore dismissed the appeal for lack of jurisdiction. The Sixth Circuit further specifically held that the decision was not a collateral order under the *Cohen* doctrine because it did not implicate an "important" issue of law. In addition, the Court held that the decision whether to substitute a party-plaintiff lies within the discretion of the trial court, and that there was "not a hint of abuse of discretion" in this case. None of these holdings from which the Petitioners seek to appeal are important issues of law within the meaning of Rule 17. Contrary to the Petitioners' assertions, these decisions do not pertain to the right of trial by jury or the power of non-Article III Courts to adjudicate certain controversies. The District Court simply abided by the Rules of Civil procedure and the clear mandate of the Bankruptcy Code by substituting as party-plaintiff the true owner of the cause of action — the Chapter 7 Trustee to which ownership of the action passed at the time of the Petitioners' bankruptcy filing.

C. The Petitioners' Remaining Arguments Regarding the Right to Trial by Jury and Due Process are also Without Merit.

The Petitioners also assert that the trial court and the Court of Appeals erred by denying the Petitioners their right to trial by jury, and further violated their rights to due process. Not only are these arguments without merit, they have no bearing on the

issue of whether this Court should grant certiorari to review an interlocutory order of the District Court. In this case, the District Court was guided by the United States Bankruptcy Code, which provides that "all legal and equitable interests" of debtors in property, including causes of action, become property of the estate. *See* 11 U.S.C. §541(a) and supporting Legislative History. The Bankruptcy Code further provides that the Trustee is the representative of the estate, with the capacity to sue and be sued. 11 U.S.C. §323(b) and Bankruptcy Rule 6009. The right to pursue causes of action formerly owned by the Debtor vests in the Trustee for the benefit of the estate. *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 709 (9th Cir. 1986); *Tignor v. Parkinson*, 729 F.2d 977, 981 (4th Cir. 1984); *Jefferson v. Mississippi Gulf Coast YMCA*, 73 Bakr. 179, 181-82 (S.D. Miss. 1986); *see also* 4 Collier on Bankruptcy, ¶704.02 (15th Ed. 1982). In considering the Trustee's role in controlling all property of the estate, including causes of action, it is clear that the District Court did not abuse its discretion in substituting the Trustee as party-plaintiff in the instant lawsuit.

The Petitioners' argument that the Court of Appeals decision has deprived them of the right to a jury trial and to due process under the law is misplaced. First, for the reasons stated above, the Petitioners do not own or control the cause of action against Sovran and therefore have no right to demand a jury trial. Second, none of the cases cited by the Petitioners held that a debtor in a Chapter 7 case has the right to demand a jury trial on *any* sort of claim, personal injury or otherwise, which has passed to the Trustee. Third, the Petitioners take the illogical position that a Trustee cannot even *settle* a personal injury claim in Bankruptcy Court.[1] However, the mere fact that personal in-

[1] The Petitioners ignore the fact that the Bankruptcy Court approved the compromise and settlement but directed the Trustee "to take all steps necessary to fully conclude this proceeding and *to finally settle in the District Court* the cause of action held by the estate against [the Bank]". Bankruptcy Court order entered May 29, 1987. Exhibit 1 at A-4. (emphasis added).

jury claims should be *tried* in the District Court does not deprive the Bankruptcy Court of the authority to approve a compromise and settlement of the claim. Finally, the Petitioners have not been deprived of their right to due process by the Trustee's election to settle the claim against Sovran: the Bankruptcy Code and the Bankruptcy Rules provide them with the opportunity to appear and object to any settlement proposed by the Trustee. In this case, the Petitioners have objected to the settlement, and have presented evidence in opposition, and the Bankruptcy Court has approved the settlement over the Petitioners' objections.

In summary, the Petitioners complain that the District Court failed to abide by the "plain meaning" of certain statutes, and then proceed to ignore the plain meaning of others. More importantly, the Petitioners have failed to satisfactorily explain why this Court should grant certiorari to review an interlocutory decision of the District Court.

IV. CONCLUSION

For the reasons set out above, Sovran requests this Court to deny the Petition for a Writ of Certiorari. Sovran also requests such other relief as is just and proper.

Respectfully submitted,

DEARBORN & EWING

By: Craig J. Donaldson, Esq.

By: Gregory D. Smith, Esq.

By: L. Webb Campbell, II, Esq.

Suite 1200, One Commerce Place
Nashville, TN 37239
(615) 259-3560

Attorneys for Sovran Bank

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Case No. 385-00421
Chapter 7 Proceedings
Judge George C. Paine, II

In Re:
Charles W. Bauer, a/k/a Charles W. Bauer, Jr.,;
and Nellie P. Bauer, a/k/a Nellie Patrick Bauer,
Debtors.

ORDER

(May 29, 1987)

This case came before the Court on the motion of the Debtors to set aside the Order entered by this Court on February 19, 1987, denying confirmation of the Debtors' Chapter 13 Plan and converting the case to Chapter 7, and the motion by Robert H. Waldschmidt, Trustee, to dispose of the Debtors' objection to the proposed compromise and settlement of the estate's cause of action against Commerce Union Bank. Also before the Court was the Debtors' renewed motion for equitable relief from the conditions imposed upon conversion to Chapter 13 and for an extension of the sixty (60) day deadline for confirmation of their Chapter 13 Plan. This motion was previously denied by this Court. Upon consideration of these motions, the entire record before this Court, the evidence presented by the Debtors, the Trustee, and Commerce Union Bank of Clarksville, and the arguments of counsel, the Court finds as follows:

1. The Debtors filed for relief under Chapter 7 of the Bankruptcy Code on February 25, 1985. They received a discharge of all debts on June 4, 1985. Their case was closed on June 21, 1985.

2. Subsequent to receiving a discharge and the closing of their bankruptcy case, the Debtors brought an action in the United States District Court for the Middle District of Tennessee against Commerce Union Bank of Clarksville for conduct which allegedly occurred prior to the date of their Chapter 7 petition. The Debtors sought Five Million and 00/100ths Dollars ($5,000,000.00) in damages in this action. However, the Debtors had failed to disclose this cause of action as an asset on their bankruptcy petition or the underlying facts which occurred prior to the filing of their petition. The Debtors also failed to inform the Chapter 7 Trustee of this potential cause of action at any time during the pendency of their bankruptcy case. Based upon their failure to disclose this asset, the District Court stayed the District Court proceedings pending reopening of the Debtors' bankruptcy case.

3. The Debtors then moved this Court to reopen their bankruptcy case to allow the administration of this asset. The former Trustee, Robert H. Waldschmidt, joined in this motion and the case was reopened over the objections of Commerce Union Bank of Clarksville. Robert H. Waldschmidt was reappointed as Trustee.

4. Subsequent to the reopening of the Debtors bankruptcy case, the Trustee moved this Court to allow the compromise and settlement of the estate's cause of action against Commerce Union Bank of Clarksville. By the terms of the proposed settlement, the creditors of the Debtors' Chapter 7 bankruptcy estate would receive a dividend of approximately Sixty-five cents (65¢) on the dollar. The Debtors objected to the proposed settlement and moved to convert their case to a case under Chapter 13 of the Bankruptcy Code. After a hearing held November 4, 1987, at which the Court heard evidence on both issues, the Court entered an order allowing the Debtors to convert their case to Chapter 13. This order provided, *inter alia,* that failure of the Debtors to confirm a Chapter 13 Plan by no later than February 3, 1987 (Sixty (60) days from the date of conversion), would result in the Debtors' case being reconverted to Chapter 7.

6. The Debtors moved this Court for equitable relief from the Sixty (60) day deadline for confirmation on January 22, 1987. This motion was denied by this Court on January 23, 1987.

7. The Debtors proposed a Chapter 13 Plan and a meeting of creditors was held on January 27, 1987. Commerce Union Bank of Clarksville objected to confirmation of the plan, and a confirmation hearing was held January 27, 1987. Based upon the evidence presented at the hearing, the arguments of counsel, and the entire record in the case, the Court denied confirmation and ordered the case to be reconverted to Chapter 7. After the Court announced its decision, but prior to the entry of the Order, the Debtors renewed their motion for equitable relief from the Sixty (60) day deadline imposed by this Court for confirmation of a Chapter 13 Plan. Subsequent to the entry of the Order, the Debtors moved this Court to set aside the Order, and the Trustee moved the Court to dispose of objections to the proposed compromise and settlement.

8. The Court finds that there is no basis for granting equitable relief from the Sixty (60) day deadline to the Debtors, nor is there any reason to set aside the Order entered February 19, 1987. The Court specifically finds that the conditions placed upon the Debtors upon conversion of their case to Chapter 13 were appropriate under the circumstances of this case.

9. The Court also finds that the proposed compromise and settlement is reasonable and is in the best interest of creditors and the estate and should be approved.

Based upon the foregoing findings of fact and conclusions of law, it is hereby

ORDERED that the Debtors' motions to set aside the order entered by this Court on February 19, 1987, is DENIED; It is further

ORDERED that the Debtors' renewed motion for equitable relief is also DENIED; It is further

ORDERED that the Trustee's motion to dispose of the Debtors' objection to the proposed compromise and settlement is GRANTED; It is further

ORDERED that the Trustee is directed and authorized to take all steps necessary to fully conclude this proceeding and to finally settle in the District Court the cause of action held by the estate against Commerce Union Bank.

Entered this _____ day of May, 1987.

/s/ Judge George C. Paine, II

APPROVED FOR ENTRY:

DEARBORN & EWING

/s/ Craig J. Donaldson

/s/ Gregory D. Smith
Suite 1200
One Commerce Place
Nashville, TN 37239
615/259-3560

Attorneys for Commerce Union
Bank of Clarksville

COSNER & WALDSCHMIDT

/s/ Robert H. Waldschmidt
Chapter 7 Trustee
20th Floor
First American Center
Nashville, TN 37238-0064
615/259-2179

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document has been delivered first class, postage prepaid to Mr. Robert H. Waldschmidt, Chapter 7 Trustee, 20th Floor, First American Center, Nashville, TN 37238; Ms. Linda W. Knight of Gullett, Sanford, Robinson & Martin, Counsel for the Debtors, P.O. Box 2757, Nashville, TN 37219-0757; Mr. David Burn and Mr. Michael Meyer of Burn & Meyer, 172 Second Avenue North, Suite 202, Nashville, TN 37201; and Mr. Henry E. Hildebrand, III, Chapter 13 Trustee, St. Cloud Corner, 500 Church Street, Nashville, TN 37219, this 26th day of May, 1987.

Gregory D. Smith

88-1209 (3)

No.

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT, as Trustee of the Bankruptcy Estate of CHARLES W. and NELLIE P. BAUER, SOVRAN BANK/CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. WALDSCHMIDT
HOWELL, FISHER & BRANHAM
300 James Robertson Parkway
Court Square Building
Nashville, TN 37201
(615) 244-3370
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

10 pp

QUESTIONS PRESENTED

1. Whether an order substituting a trustee in bankruptcy as the plaintiff in a District Court action, wherein the debtor in bankruptcy was the original plaintiff, is appealable under the collateral order exception to the final judgment rule.

2. Whether 28 U.S.C. § 1411 grants to debtors in bankruptcy proceedings standing to pursue prepetition claims which are assets of their bankruptcy estate.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Petition	3
Conclusion	6

TABLE OF AUTHORITIES

Page

Cases:

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3

Management Investors v. U.M.V., 610 F.2d 384 (6th Cir. 1979) 4

In re McCorhill Publishing, Inc., 89 B.R. 393 (Bankr. S.D. N.Y. 1988) 3,4

Scharmer v. Carrolton Mfg. Co., 525 F.2d 95 (6th Cir. 1975) 4

Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984) 4

Constitution, Statutes, Rules and Regulations:

11 U.S.C. § 541 4

11 U.S.C. § 704 4

28 U.S.C. § 1411 3,4,5

Title 11, United States Code 5

Rule 17, Supreme Court Rules 6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT, as Trustee of the Bankruptcy Estate of CHARLES W. and NELLIE P. BAUER, SOVRAN BANK/CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Robert H. Waldschmidt, as trustee for the bankruptcy estate of Charles W. and Nellie P. Bauer, hereby objects to the petition of Charles W. and Nellie P. Bauer for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case relative to the substitution of the trustee as the plaintiff in a personal injury action in the United States District Court for the Middle District of Tennessee.

OPINIONS BELOW

Respondent would incorporate by reference the statement relative to opinions below cited in the petition for writ of certiorari.

JURISDICTION

Respondent would incorporate by reference the statement relative to jurisdiction cited in the petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Respondent would incorporate by reference the statement relative to statutory provisions involved cited in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent would incorporate by reference the statement of the case cited in the petition for writ of certiorari, except for the following facts which should be added for clarification:

1. The petitioner's ability to recover any damages from Sovran Bank in the District Court action is highly contingent; the claim has not been adjudicated, and the value of the claim is disputed by the parties.

2. The trustee in bankruptcy did not, and could not, authorize counsel for the petitioners to proceed with the District Court action on behalf of the bankruptcy estate. At the time of the correspondence (set forth in the appendix of the petitioner, A-39-41), the bankruptcy case had been closed, and the trustee had been discharged from further duties. The trustee was not vested with any authority to make any decisions on behalf of the estate at the time of that correspondence.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because the opinion of the United States Court of Appeals for the Sixth Circuit is consistent with public policy, statutory construction, and decisions by other courts which have rendered decisions interpreting 28 U.S.C. § 1411.

The Court of Appeals held that the order substituting the trustee as plaintiff did not meet the collateral order exception to the final judgment rule. However, in finding that the District Court decision did not involve an "important" issue, as required under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the court had to analyze the petitioner's argument involving a right to trial by jury under 11 U.S.C. § 1411. The Court of Appeals correctly applied the principles of that case in finding that the appeal did not involve an "important" issue.

The petitioners have asserted that the decision of the Court of Appeals conflicts with a Bankruptcy Court decision out of the Southern District of New York. *In re McCorhill Publishing, Inc.*, 89 B.R. 393 (Bankr. S.D. N.Y. 1988). The petitioners allege that this case creates a conflict between Circuits, thereby justifying the grant of certiorari in this case. This position is unfounded.

First, the *McCorhill* decision was rendered by a Bankruptcy Court, and not the Second Circuit Court of Appeals; the Second Circuit cannot be deemed to take an inconsistent position merely by the holding of a Bankruptcy Court in one district of the circuit. Furthermore, the *McCorhill* case did not involve a conflict between the trustee and the debtor. In that case, the trustee supported the debtor's joinder in the proceeding, and the joint effort between the trustee and the debtor did not impose any restriction on the administration of the bankruptcy estate. In the instant case, the trustee's intentions with respect to the District Court action differ from the desires of the deb-

tors. The trustee has sought to compromise and settle the claim against Sovran Bank, and the debtors have objected to the trustee's proposed settlement. Therefore, the debtors' participation in the District Court litigation would merely serve to frustrate and restrict the efforts of the trustee to administer an asset of the bankruptcy estate, unlike the situation in the *McCorhill* case. Thus, there is no split between the Circuit Courts of Appeal.

The petitioners have also asserted that the substitution of the trustee as plaintiff denies them the right to a trial by jury under 28 U.S.C. § 1411, and thus, an important question of federal law has been decided. The trustee asserts that this position is without merit.

Under the provisions of 11 U.S.C. § 541, the personal injury action of the Bauers became part of the bankruptcy estate upon the filing of their voluntary petition under Chapter 7. *Management Investors v. U.M.W.*, 610 F.2d 384 (6th Cir. 1979); *Scharmer v. Carrolton Mfg. Co.*, 525 F.2d 95 (6th Cir. 1975); *Tignor v. Parkinson*, 729 F.2d 977 (4th Cir. 1984). Under the Bankruptcy Code, debtors do not have any authority to administer assets of an estate in a Chapter 7 proceeding. The Chapter 7 trustee is given the responsibility of administering all assets of the estate under 11 U.S.C. § 704. Therefore, the Bauers do not have standing to pursue the District Court action, and substituting the trustee as plaintiff was appropriate.

The Bauers have asserted that substituting the trustee as plaintiff destroys the right to trial by jury established in 28 U.S.C. § 1411. However, the District Court's order does not eliminate the right to trial by jury; the trustee is vested with that right if he chooses to litigate the matter. Hence, the right to a jury trial under 28 U.S.C. § 1411 is preserved for the benefit of the bankruptcy estate.

The petitioners assert that they will forfeit the right to trial by jury because the trustee intends to compromise this litigation.

However, the election of the trustee to litigate or compromise the cause of action does not constitute a loss of the right to a trial by jury under 28 U.S.C. § 1411. The only right which has been forfeited by the Bauers is their ability to control the administration of their bankruptcy estate, which includes the District Court action.

It has also been asserted that the Bauers have a direct interest in this District Court proceeding. The trustee agrees that the debtors have an interest in any surplus funds generated in the bankruptcy proceeding, but that does not create standing in the District Court action. The Bauers' rights are limited to contesting any proposed compromise in the Bankruptcy Court. Thus, although the Bauers may have a concern about the resolution of the District Court action, their interest is limited to a claim against any surplus funds of the bankruptcy estate, after payment has been made to their creditors.

The petitioners had the opportunity to control their own destiny. When the bankruptcy petition was originally filed, they elected to proceed under Chapter 7, receive a discharge, and permit their assets to be administered pursuant to the provisions of Title 11 of the United States Code. They could have chosen to file under Chapter 11 or 13, thereby preserving their ability to control this litigation. That voluntary decision by the debtors permits this action to be administered by the Chapter 7 trustee, and their attempt to regain control over the District Court action is unsupported under legal or equitable grounds.

Therefore, the debtors do not have standing to pursue the District Court Action, and a substitution of the trustee as plaintiff in the District Court action does not create any conflict between Circuits, or violate any rights under 28 U.S.C. § 1411.

CONCLUSION

The decision of the Court of Appeals does not conflict with any other Circuit Court decision, does not depart from the accepted and usual course of judicial proceedings, and does not involve any important federal question. Pursuant to Rule 17 of the Supreme Court Rules, there is no basis for the grant of a writ of certiorari and hence, the petition of Charles & Nellie Bauer should be denied.

Respectfully submitted,

/s/ Robert H. Waldschmidt
Counsel of Record
HOWELL, FISHER &
BRANHAM
Court Square Building
300 James Robertson Parkway
Nashville, TN 37201
(615) 244-3370

Attorney for Respondent Trustee